

1 MR. ABAKA: I'm not sure if the
2 District is in the consortium, but we are
3 considered qualified and certified. It's
4 just that D.C. is not in it, as far as I
5 know.

6 THE COURT: D.C. is --

7 MR. ABAKA: As far as I know it's not
8 in the consortium.

9 THE COURT: So, why don't you get
10 certified in the District of Columbia?

11 MR. ABAKA: I don't believe they
12 offer --

13 THE COURT: Yes; they do. Just like
14 -- just like a driver's license. It's kind
15 of like, each jurisdiction has it's own. So,
16 why would you not be certified in the
17 District of Columbia?

18 MR. ABAKA: I've worked many times in
19 the District, Your Honor. I don't know if --
20 like I said, I don't know if D.C. is in the
21 consortium or not, but we are in a consortium

1 of all the states that I -- I've never had
2 any problems with qualifications before.

3 MR. KATZ: Your Honor, I think the
4 central issue is, from my experience and with
5 multilingual and bilingual people over
6 several years is what's in the pudding.

7 I'd like to have the opportunity for
8 Your Honor and/or me to develop with this
9 interpreter what his experience level is,
10 what he has been doing and how intensely he's
11 acting as an interpreter.

12 I think the proof is in the pudding,
13 because I have had a lot of experience having
14 grilled interpreters and I have been able to
15 cut to the chase with about five different
16 questions.

17 As I said, ours is a multilingual
18 office and we do have -- we focus on Spanish
19 speakers. If we felt there was any problem
20 with the interpreters that work for Magavis
21 Company, which is who this interpreter is

1 sent through, we wouldn't be using them any
2 more. (inaudible) is consistent.

3 We have excellent results with -- if
4 you are from Magavis, you have excellent
5 results through them.

6 THE COURT: But you are not an
7 employee of Magavis, are you.

8 MR. ABAKA: We are service contract.
9 I work with them and I do some of my own
10 stuff, contracting.

11 THE COURT: Because I notice your
12 cards says your name incorporated.

13 MR. ABAKA: I have a -- one of the
14 cards from Magavis also.

15 MR. KATZ: Could I ask a few
16 questions, Your Honor.

17 THE COURT: Go ahead, Mr. Katz.

18 MR. KATZ: How long have you been
19 working as an interpreter?

20 MR. ABAKA: Twelve years.

21 MR. KATZ: Where were you born?

1 MR. ABAKA: Nicaragua.

2 MR. KATZ: How many languages do you
3 speak?

4 MR. ABAKA: Six.

5 MR. KATZ: How often do you do
6 interpretation work in a given week?

7 MR. ABAKA: Everyday.

8 MR. KATZ: About how many hours a
9 week are you doing actual interpreting,
10 versus translating?

11 MR. ABAKA: Most of my work is
12 interpretation. It's about -- I would say 20
13 to 30 hours a week.

14 MR. KATZ: How much of your
15 interpretation work is litigation
16 interpretation, courtroom work, depositions?

17 MR. ABAKA: Almost 100 percent.

18 MR. KATZ: Which courthouses do you
19 work in?

20 MR. ABAKA: Arlington Courthouse,
21 Prince George's County, Fairfax County,

1 Frederick County, Prince William County and
2 Alexandria, Virginia.

3 MR. KATZ: Are you familiar with all
4 the other interpreters at Magavis Company
5 currently uses?

6 MR. ABAKA: I do.

7 MR. KATZ: Do you have an opinion
8 about the quality of those interpreters?

9 MR. ABAKA: It's very high quality.

10 MR. KATZ: What is the basis of that
11 opinion?

12 MR. ABAKA: Well, working with them
13 for the last 12 years.

14 MR. KATZ: You have had an
15 opportunity -- in what way have you had an
16 opportunity to find out the quality of the
17 other interpreters that Magavis assigns for
18 interpretation of?

19 MR. ABAKA: Well, we work around each
20 other. We were working with each other for
21 many years. We know each other very well. I

1 mean, all the interpreters that is.

2 MR. KATZ: All right. Now, what are
3 some of the important things to look for in a
4 quality interpreter, a Spanish interpreter
5 for litigation?

6 MR. ABAKA: Well, there's three words
7 for interpretation, sight, simultaneous and
8 consecutive.

9 You have to be pretty fluid in all of
10 them and you just have to know the
11 terminology to have to be very well versed in
12 both languages, very proficient in them,
13 understand the cultural as well as the
14 lingual words.

15 MR. KATZ: Okay. Which of these
16 things are you able to do and are not able to
17 do?

18 MR. ABAKA: I'm able to do all of
19 them.

20 MR. KATZ: Your Honor --

21 THE COURT: Anything, Mr. Green?

1 MR. GREEN: Yes. I've got a couple
2 of questions.

3 You've had an opportunity to talk
4 with this man; is that right?

5 MR. ABAKA: Very briefly.

6 MR. GREEN: Where is he from?

7 MR. ABAKA: I don't know.

8 MR. GREEN: Isn't it a fact that in
9 the Spanish languages, like in the English
10 language there is different idiomatic
11 expressions peculiar to different countries,
12 like if I were from Nicaragua and another guy
13 is from Guatemala, whatever, there would be
14 different idioms?

15 MR. ABAKA: That's correct. Just
16 like the United States with Great Britain and
17 Australia and some other countries.

18 MR. GREEN: We don't have to go that
19 far. We can talk the United States -- I
20 mean, my friends down in North Carolina, you
21 know?

1 MR. ABAKA: Yes.

2 MR. GREEN: All right. I noticed
3 that you indicated that you've been involved
4 in Prince George's County, which is in the
5 State of Maryland and Arlington, which is in
6 the Commonwealth of Virginia; is that right?

7 MR. ABAKA: That's right.

8 MR. GREEN: What if any experience
9 have you had in the District of Columbia as
10 an interpreter?

11 MR. ABAKA: I have interpreted on
12 occasion in the courts here in the District
13 of Columbia.

14 MR. GREEN: Oh, which one?

15 MR. ABAKA: D.C. Superior Court.

16 MR. GREEN: D.C. Superior Court. For
17 what judge.

18 MR. ABAKA: I don't recall his name.
19 It was several years ago and it was a -- it
20 was a civil matter. It was several years
21 ago. I don't recall the account.

1 MR. GREEN: Were you hired for that
2 purpose or were you just volunteering to help
3 a friend?

4 MR. ABAKA: I was hired.

5 MR. GREEN: Who hired you?

6 MR. ABAKA: It was an attorney. I
7 was with the same agency -- with the same
8 company as I am now. So, it was a -- I don't
9 know the details. The company has all that.

10 MR. GREEN: And this was several
11 years ago?

12 MR. ABAKA: Yes, sir.

13 MR. GREEN: And you don't work in the
14 District at this point; is that right or --

15 MR. ABAKA: Not on a regular basis.
16 Only when I do work for attorneys --
17 particular attorneys, but not in the
18 courthouse itself.

19 MR. GREEN: Primarily for attorneys?

20 MR. ABAKA: Trial attorneys.

21 MR. GREEN: I don't have any other

1 questions, Your Honor.

2 THE COURT: Sir, you have only
3 interpreted in the Superior Court on one
4 occasion?

5 MR. ABAKA: Several times, Your
6 Honor, but the last time was a few years ago.

7 THE COURT: I see. All right.
8 Have a seat, sir.

9 MR. ABAKA: Thank you.

10 THE COURT: Go ahead, Mr. Katz.

11 MR. KATZ: Your Honor, I wanted to
12 collect up the exhibits that I handed up to
13 you. I'll be referring to them during my
14 client's testimony.

15 THE COURT: Respondent's exhibits?

16 MR. KATZ: Yes.

17 MR. GREEN: Your Honor, for the
18 record, because we don't have any
19 certification from this individual, I would
20 object to him interpreting for the
21 respondent. He's not -- he hasn't been

1 appointed by the Office of Adjudication.

2 I would feel comfortable if that were
3 the case. I'm not -- I'm not impugning his
4 credibility or character. I think he
5 understands that. I'm talking about the
6 interpreter now.

7 But for the record, in light of the
8 fact that he is not on that certified list
9 that is normally provided here, I would have
10 a problem and I would ask that he not be
11 allowed or be disallowed from interpreting
12 for this respondent and that a -- one that's
13 on the list of certified by the Office of
14 Adjudication be the interpreter.

15 MR. KATZ: Well, you know if that was
16 brought up to me this morning -- I told Your
17 Honor and Mr. Green this morning that we had
18 an interpreter. We brought all that up this
19 morning and on the phone immediately and he's
20 put in money for that.

21 I found someone here, okay? Mr.

1 Green didn't do that and so now his motives
2 here are suspect. Now, when we opened up our
3 law firm three and a half years ago, I was
4 tearing interpreters apart if we were at a
5 deposition and if my opposing lawyer didn't
6 tell me who the interpreter was, okay, so
7 that I could find out the qualifications by
8 then.

9 And now, I know that all I need is to
10 come -- bring down five questions to know if
11 they are good or not. Your Honor, we've got
12 my assistant here. She's fully bilingual in
13 Spanish. She can easily, you know, if you've
14 got to make a phone call to someone that's
15 got some special certification in D.C., fine.

16 The thing is, you know the outfit
17 that we use in Northern Virginia and there is
18 a specific reason we use them is for
19 flexibility. They've got several people, so
20 then if we cancel, we're not being charged
21 for a full day of testimony.

1 I've run into this problem -- one of
2 our favorite interpreters who is also used by
3 Magavis Company had Pat Roselle (ph). I
4 liked using her, but she always tells me, if
5 you have to cancel on the day before, I've
6 got to charge you for the full day.

7 MR. KATZ: ...today. And it's a
8 matter of practicality, Your Honor.

9 You know, I can get on the phone, and
10 I suppose that I could call somebody with
11 certified (inaudible) here, or be here
12 yesterday.

13 But I -- I do feel sandbagged. I
14 think we made the record that he's a
15 qualified interpreter. And I now know, Your
16 Honor, next time I'm in front of you that
17 I'll get someone who can tell you that he's
18 certified in D.C.

19 THE COURT: I mean, it's just like
20 any other license or permit. I mean, he
21 knows that there's -- there's one that's

1 required in Maryland, he knows that there's
2 one required in Virginia. He went out, he
3 got those certifications; but for some odd
4 reason, he didn't -- didn't think it was
5 necessary to get it in the District of
6 Columbia.

7 MR. GREEN: Because they think they
8 can roll over the District of Columbia, Your
9 Honor.

10 THE COURT: And that's one of the
11 problems that, you know --

12 MR. KATZ: Well, let's -- let's talk
13 about it --

14 THE COURT: But --

15 MR. KATZ: -- from a practical --

16 THE COURT: But --

17 MR. KATZ: -- standpoint and --

18 THE COURT: Okay, Mr. Katz.

19 I -- I will allow him to testify.
20 Let's -- sorry, to interpret.

21 MR. KATZ: Okay.

1 MR. GREEN: I have a continuing
2 objection, Your Honor.

3 THE COURT: Objection is noted.
4 Objection noted, overruled.

5 Let's -- let's go, Mr. Katz.

6 MR. KATZ: Hopefully, it -- I hope it
7 doesn't help -- that I'll remember it from
8 the next time -- I mean, you know, just
9 remember, please, that, you know, when I so
10 occasionally in court, we just hire an
11 interpreter, and we won't have these
12 questions. It's always a running process,
13 and I was (inaudible), you know?

14 THE COURT: All right.

15 MR. KATZ: Okay. Thank you.

16 I think we (inaudible) if I'm not
17 mistaken.

18 THE COURT: Yes.

19 MR. KATZ: Thank you.

20 BY MR. KATZ:

21 Q Jose, what's your full name?

1 MR. GREEN: Your Honor, I'm going to
2 object. The interpreter has not been sworn
3 in.

4 THE COURT: Raise your hand, sir.

5 (Interpreter sworn.)

6 BY MR. KATZ:

7 Q Jose, what's your full name?

8 A Jose Maria Montiel.

9 (No audio.)

10 Q Where do you work?

11 A At the Fun Fair Video Store.

12 Q And what is your position with them?

13 A I'm the manager and the owner at the
14 same time.

15 Q Where do you live?

16 A 135 Ellicott Street, Washington --
17 Northwest, Washington, D.C.

18 Q How long have you been the owner of
19 Fun Fair Video?

20 THE WITNESS: From 1996.

21 BY MR. KATZ:

1 Q I want you to speak -- I want you to
2 speak in Spanish, okay?

3 A All right. Since 1996.

4 Q Where did you work before then?

5 A I worked for a Korean gentleman for
6 eight years.

7 Q In what kind of work?

8 A The same kind of business.

9 Q Now, you were -- you had a hearing
10 around 2000 in front of the same Judge?

11 A Yes.

12 Q And who was your lawyer at the time?

13 A Mr. Wright and Mr. O'Bryant.

14 Q What's Mr. O'Bryant's first name?

15 A O'Bryant.

16 (Inaudible.)

17 Q What -- what happened the last time
18 you had a trial in front of this Judge that
19 we're here before today?

20 A I honestly don't remember because
21 everything was in English.

1 Q Do you know what the Judge's written
2 opinion says, right?

3 A Yes.

4 Q Now, after this written opinion came
5 down, was your store open?

6 A No.

7 Q Okay. At what point did you close
8 your store in relation to the last time you
9 had a trial in front of Judge Simon?

10 A (Inaudible.)

11 Q Okay. Well, when you had the trial
12 in front of Judge Simon, was your store open?

13 A No; it was closed.

14 Q Who -- who closed your store?

15 A The Police Department, because away
16 all my papers.

17 Q When you were here in front of Judge
18 Simon the last time, you were testifying
19 without an interpreter?

20 A Yes.

21 Q Do you feel the need for an

1 interpreter today?

2 A Yes.

3 Q Why?

4 A Because, honestly, I don't understand
5 what (ph) --

6 Q Okay. Why weren't you using an
7 interpreter at the last trial?

8 A That was the attorney's problem. He
9 (inaudible) in the process.

10 Q Okay. Did you at some point reopen
11 your store?

12 A Not during the 11 months.

13 Q Okay. But you opened the store after
14 11 months?

15 A Yes.

16 Q Why?

17 A Because the Police Department gave me
18 the Occupant Permit, and Mr. O'Bryant told me
19 that I could continue under the same
20 (inaudible) regulations that they had come
21 and get me to quit.

1 Q Okay. Mr. O'Bryant gave you advice
2 about what to do to reopen the store?

3 A That's right.

4 Q What was the advice that he gave you?

5 A He got together with Mr. Hicks, and
6 they talked about the movies in general and
7 adult movies.

8 THE COURT: Let me stop you right
9 there. You said the lawyer got together with
10 whom?

11 THE WITNESS: Mr. Fitch.

12 THE COURT: Who is that?

13 (Inaudible conversation.)

14 BY MR. KATZ:

15 Q Are you talking about Ms. Hicks or
16 Mr. Hicks.

17 A Mrs. Hicks; it's something like that.

18 THE COURT: Okay. So that's Mrs.
19 Hicks.

20 THE WITNESS: Mrs. Hicks.

21 THE COURT: All right. Go on.

1 BY MR. KATZ:

2 Q Ms. Hicks; is that Gladys Hicks?

3 A Exactly.

4 Q That's the woman who used to be the
5 Zoning Administrator for D.C.?

6 A That's right.

7 Q And when your last lawyer was working
8 with her, was she working in the private
9 sector?

10 A I don't understand, the private
11 sector.

12 Q Was she still working with the
13 government when she was helping you?

14 A Not anymore.

15 Q What was Ms. Hicks doing with your
16 lawyer, Adjie?

17 A They talked about the space and the
18 amount, the numbers.

19 Q Okay. And -- and who gave you a
20 suggestion about what you should do with the
21 space and what you should do with the number

1 of booths?

2 A She gave the suggestion to the
3 attorney; the attorney gave me -- she told me
4 to reopen.

5 Q Okay. Now, have you been following
6 what your lawyer suggested you do with the
7 floor space and with the number of booths?

8 A That's right.

9 Q And what have you been doing to
10 follow that advice?

11 A They left me with eight rooms, and 15
12 percent of adult material.

13 Q And how many booths?

14 A Eight.

15 Q And how many booths are operating
16 now?

17 A Eight.

18 Q Have you ever had 10 booths
19 operating?

20 A When I opened up again, the
21 department with different regulations sent me

1 some paperwork; and the license with the
2 paperwork, they said that I could open up 10
3 rooms.

4 Q And now you're back to eight booths?

5 A I have eight.

6 Q What have you done with the two
7 booths that you're not operating?

8 A I closed them up.

9 Q In what way did you close them up?

10 A I put a sign that says, Out of
11 Service, and I put them (ph) on the doors so
12 nobody can't come in.

13 Q Okay. Now, after the time that you
14 reopened, were you aware of any time that
15 your videos and DVD's in your adult section
16 have taken up more than 15 percent of all the
17 adult videos and DVD's in your -- in your
18 general and adult video section?

19 A No. It's always under control.

20 Q Well, how do you make sure that it's
21 under control?

1 A I have a regular (ph) percentage, and
2 the adult percentage is 15 percent, sometimes
3 less.

4 Q How much time do you spend in the
5 store each week?

6 A Sometimes five days during daytime,
7 and sometimes four nights.

8 Q Do you own any other businesses?

9 A No.

10 Q Do you work for anyone else anywhere
11 else?

12 A No.

13 Q Now, after the time that you -- when
14 did you reopen, in 2001?

15 A Yes.

16 Q After you reopened in 2001, did you
17 ever have dildos?

18 A Yes.

19 Q Do you have them anymore?

20 A No.

21 Q Do you -- after you reopened in the

1 year 2001, did you sell any magazines?

2 A No.

3 Q Please describe the back room for the
4 Judge; is there any cameras in the back room?

5 A I have three cameras.

6 Q Okay. And who's able to monitor the
7 cameras?

8 A The cashier in front.

9 Q And what do the cameras look at?

10 A The doors in front of each doorway.

11 Q Whenever somebody goes to the back
12 room, do you always have an employee in the
13 back room?

14 A That's right.

15 Q Well, how are you able to do that if
16 you're going to have an employee in front of
17 the store watching the counter?

18 A I have two employees.

19 Q Sometimes more than two?

20 A (Inaudible.)

21 Q Okay. What type of training do you

1 give your employees to make sure that people
2 under 21 years old do not go into the adult
3 video section and do not go into the booth
4 area?

5 A When we see a young person, we ask
6 for an I.D.

7 Q And if the person's under 21?

8 A We don't let them go in.

9 Q But the people under 21 are allowed
10 in the general merchandise area?

11 A Very little. We hardly have any --
12 anyone who's underage there.

13 Q What type of training, if any, do you
14 give to your employees to make sure that two
15 people don't go into the same booth?

16 A Well, each person that wants to go
17 inside and look at pictures pays \$3.00. For
18 those \$3.00, they get 15 minutes. We put the
19 money in front at the counter. We make sure
20 that the client that's in the room will put
21 the money in the front?

1 A Are you familiar with a business
2 called Lewis Road (ph)?

3 A Yes.

4 Q What is Lewis Road?

5 A It's nude dancing.

6 Q How far is Lewis Road from your
7 store?

8 A At the corner about half a block
9 away.

10 Q I'm going to show you what's already
11 been admitted into evidence as Exhibits 28
12 through 22; I think you've seen these
13 photographs before?

14 A Yes.

15 Q Are those photographs fair and
16 accurate portrayals of what those parts of
17 the store now look like?

18 A That's right, just the way it is
19 here.

20 Q Not including the inventory, are
21 these pictures fair and accurate depictions

1 of the way the rest of the store looked like,
2 including where the walls are and where the
3 racks are?

4 A Yes.

5 (No audio.)

6 Q Okay. Except for your removing
7 dildos, is there much -- is there much change
8 in -- in any of your inventory, including the
9 percentage of adult videos and DVD's versus
10 the general videos and DVD's?

11 A The only difference I see is how much
12 this -- difference I see is that the adult
13 material was stacked up in the racks.

14 Q Okay. And you're saying adult
15 material is stacked up in the racks now or if
16 it was stacked up in the racks before?

17 A No, because it's the same adult
18 section.

19 Q Okay. But -- but does that mean that
20 you have any more adult videos now?

21 A No.

1 Q Okay. Do you -- other than R-rated
2 movies, do you have any videos and DVD's
3 displaying nudity in the general video and
4 DVD area of your store?

5 A No, but -- and I can't have that.

6 Q Was that the same situation last
7 September of 2001?

8 A It was different.

9 Q What was -- what was the situation
10 last September?

11 A I had more adult material.

12 Q I'm going to show you Exhibit -- I
13 thought it was marked.

14 THE COURT: You have the other one
15 that was marked. That one was given to me.
16 But it is Exhibit 1, nonetheless.

17 MR. KATZ: Okay.

18 THE COURT: There is another one
19 that's marked --

20 MR. KATZ: You know, our witness
21 walked off with it, or else it's the one that

1 Mr. Green has. Okay, it looks like our
2 witness may have walked out -- off
3 (inaudible) -- and maybe substitute the one
4 in front of you --

5 THE COURT: All right.

6 MR. KATZ: -- as being (inaudible).

7 THE COURT: Oop.

8 MR. KATZ: I'm sorry, Your Honor.

9 BY MR. KATZ:

10 Q I'm showing you (inaudible) Exhibit

11 1. Do you recognize that? What is it?

12 A Yes, yes.

13 Q What is it?

14 A Yes. It's a complete map of the
15 inside of the store.

16 Q Between last September and now, have
17 you -- has anybody moved any of your walls in
18 the store?

19 A No.

20 Q Between last September and now, has
21 anybody moved any of your racks?

1 A No.

2 Q Okay. Between last September and
3 now, have there been any significant physical
4 changes to your store, except for maybe
5 moving some boxes from one part of the store
6 to another?

7 A No, none; just that the fact that
8 only sometimes I order material.

9 Q Now, you have a Certificate of
10 Occupancy for your store right now?

11 A That's right.

12 Q And you have a license for the booths
13 right now?

14 A I use the license that I have.

15 Q So the license is -- is current right
16 now?

17 A Yes.

18 Q Your current Certificate of Occupancy
19 is -- is a non-adult business?

20 THE INTERPRETER: I'm sorry?

21 BY MR. KATZ:

1 Q Your current Certificate of Occupancy
2 is for a non-adult -- say, it's for a non-
3 sexual-oriented business?

4 A The Occupant Permit says -- there's a
5 phrase that says, not sexual orientation.

6 Q Do you know what -- strike that; I'm
7 sorry.

8 (No audio.)

9 A According to the book, we're allowed
10 to have 15 percent, and that's what I have,
11 is 15 percent.

12 Q What book are you talking about?

13 A Well, that's according to what Mr.
14 O'Bryant told me.

15 Q And do you know who he got that
16 information from?

17 A Well, the last one we had in 2000,
18 some inspector said that we could have 20
19 percent, 18, 15 percent.

20 Q Do you know which real estate zone
21 your store is in?

1 A Yes.

2 Q Which one?

3 A C-2-Z (ph).

4 Q And do you know -- and how do you
5 know that?

6 A I -- I don't remember where I got
7 that from, but I know that I'm in C-2-Z.

8 Q Do you know if -- when a person
9 leaves a booth in your store, do you know if
10 one of your employees goes in to clean it up
11 after they leave?

12 A It's -- it's a normal procedure. I
13 mean, when a client leaves, it's standard to
14 clean it up. I mean, I'm not the only person
15 to have booths; there's some other stores
16 that have booths also.

17 Q Well, how long have you been familiar
18 with the practice of cleaning up a booth soon
19 after a customer leaves that?

20 A We do it all the time.

21 Q All right. Now, I know we want to

1 win today, but if Judge Simon issues an order
2 that you cannot continue to have the number
3 of booths that you have and the percentage of
4 adult videos and -- videos you have without
5 having a sexual-oriented business license,
6 what are you going to do?

7 A I can't answer that question.

8 Q Why not?

9 A I honestly don't know.

10 Q But -- but as far as the way you're
11 operating the store right now, you understand
12 that is -- is the way you've been advised by
13 Mr. Wright after he spoke to Ms. Hicks?

14 A Exactly; that's right.

15 MR. KATZ: No other questions. I
16 know Mr. Green is going to ask some
17 (inaudible).

18 THE COURT: Okay. Señor Green,
19 cross-examination?

20 MR. GREEN: Thank you, Your Honor.

21 CROSS-EXAMINATION BY COUNSEL FOR

1 THE GOVERNMENT

2 BY MR. GREEN:

3 Q Sir, it's been a long day. I'm not
4 going to -- try not to prolong it too long.

5 The last time you were before this
6 Court, you were ordered to pay a fine of
7 \$500; have you satisfied that obligation,
8 sir?

9 A Yes.

10 Q You also were ordered to get a proper
11 Certificate of Occupancy -- (no audio) --
12 have you satisfied that, sir?

13 MR. KATZ: Objection. It goes for a
14 legal conclusion. That -- that's the big
15 problem about this sexually-oriented -- is
16 his license and the application for -- to get
17 a Certificate of Occupancy says, are you a
18 sexually-oriented businesses under the DCMR?
19 Who knows? (Inaudible) the definition of it;
20 no one knows. It's an overly broad and vague
21 definition.

1 MR. GREEN: Sir, I think it's a
2 perfectly legitimate question to ask him, in
3 light of the fact that an order was issued;
4 did he adhere to what he was asked to do by
5 the Judge? I don't think that's unfair.

6 I want to know, did he do what the
7 Judge told him to do, which was to get a
8 Certificate of Occupancy properly issued
9 regarding the kind of business pass (ph) that
10 he was seeking?

11 MR. KATZ: A minimum -- the question
12 is in an improper form. The way the question
13 is done, it calls for a legal conclusion.

14 If you want to ask if my client
15 applied for a sexually-oriented business
16 license, that's one thing; that's not a
17 legal-based question. This person is asking
18 -- this lawyer is -- a legal-based question -
19 -

20 MR. GREEN: I have a name, sir; I'm
21 not just a person.

1 (Overlapping and inaudible
2 conversation.)

3 MR. KATZ: He's not a lawyer.

4 MR. GREEN: No. You're going to
5 respect me and you're going to address me
6 like I respect you.

7 MR. KATZ: I do not want this --

8 MR. GREEN: Well, I'm not going to
9 get into any kind of confusion like that,
10 Your Honor.

11 MR. KATZ: -- client -- (Overlapping
12 and inaudible conversation.)

13 MR. GREEN: I think that you ought to
14 direct him to respond to me in a proper
15 manner. I will not tolerate this. I will
16 not stand for this.

17 (Overlapping and inaudible
18 conversation.)

19 THE COURT: Mr. Green -- Mr. Katz,
20 please refer to Mr. Green as Attorney Green.

21 (End of tape 6, side A.)

1 (Start of tape 6, side B.)

2 THE COURT: Mr. Green, he will refer
3 to you as Mr. Katz, Attorney Katz.

4 MR. KATZ: That's -- that's -- that's
5 just fine. And I mean no ill will. I -- I
6 just tend to be causal sometimes, and --

7 (Overlapping and inaudible
8 conversation.)

9 THE COURT: Please refer to each
10 other by the correct designation.

11 I see -- see nothing wrong with the
12 question the way in which it was being asked,
13 since it comes directly from the order, so I
14 would -- your objection is noted; overruled.

15 Go ahead, Mr. Green.

16 BY MR. GREEN:

17 Q So you were directed by the Court to
18 secure a Certificate of Occupancy that would
19 allow you to operate your business in a way
20 that was proper, as the Court saw it, to wit
21 you were to get that Certificate of Occupancy

1 that would allow you to operate that way.

2 Now, my question to you is, were you
3 -- did you do it? Did you follow the course
4 ordered as it related to the Certificate of
5 Occupancy?

6 MR. KATZ: We've got about three or
7 four compound questions. I mean --
8 (overlapping and inaudible conversation.)

9 THE COURT: There's only one
10 question. There's only one question.

11 MR. GREEN: This proceeding (ph) must
12 be having a problem with the English
13 Language, and it doesn't relate to the
14 Respondent; it relates to his lawyer.

15 I'll read the order, and it states,
16 "It is further ordered that J.M.M.
17 Corporation trading as Fun Fair Video shall
18 cease all business activity at 919 5th
19 Street, Northwest, Washington, D.C., until
20 such time that he obtains a proper
21 Certificate of Occupancy for his business."

1 That's the question, sir; have you
2 obtained, as directed by the Court, the
3 proper Certificate of Occupancy for your
4 business?

5 MR. KATZ: Please give me a
6 continuing objection, Your Honor.

7 THE COURT: All right --

8 MR. GREEN: Your Honor --

9 THE COURT: All right, objection is
10 noted. Go -- go ahead, Mr. Estano (ph).

11 THE WITNESS: I just followed the
12 steps that my attorney (inaudible).

13 THE COURT: Mr. Green.

14 BY MR. GREEN:

15 Q Were you able to get a Certificate of
16 Occupancy?

17 A He investigated, and he said I could
18 continue operating with the same Occupancy
19 Permit.

20 THE COURT: Who is the, He, sir? Who
21 is the, He?

1 THE WITNESS: My attorney, Mr.
2 Wright.

3 BY MR. GREEN:

4 Q So I take it the answer is no?

5 A I'm working with the word that he
6 gave me with -- under the same paperwork.

7 Q Sir -- (no audio).

8 You indicated that you had a problem
9 understanding what to do before this agency
10 and this tribunal the last time you were
11 here; is that correct?

12 A That's right.

13 Q And you indicated that you had
14 difficulty because you did not have an
15 interpreter; is that correct?

16 A That's right.

17 Q Isn't it a fact, sir, that you were
18 represented, not by one, but by two, dos --

19 A That's right.

20 Q (Inaudible.) Is that right? I see
21 you nodding your head.

1 THE COURT: (Inaudible) -- you have
2 to answer.

3 THE WITNESS: That's right.

4 BY MR. GREEN:

5 Q Sir, have you applied to the Board of
6 Zoning Adjustment for a variance to operate
7 your business in this current location?

8 MR. KATZ: Objection. That's not
9 eligible under the law, Your Honor. That's
10 written in the DCMR. He's not in a zone
11 that's allowed to get a sexual-oriented
12 business license.

13 THE COURT: Several -- what -- what
14 are you saying, Mr. Katz?

15 MR. KATZ: (Inaudible) the question's
16 improper. DCMR, Section 7 --

17 (Overlapping and inaudible
18 conversation.)

19 THE COURT: Is his business proper to
20 be where it is? Is his business proper to be
21 where it is?

1 MR. KATZ: I'm -- I'm sorry, I'm not
2 following you.

3 THE COURT: You're saying the
4 question is improper, because?

5 MR. KATZ: Because the question is,
6 do you -- did he apply to get a -- a sexual-
7 oriented business license where he is now.
8 He's not eligible to get a sexual-oriented
9 business license where he is now --

10 THE COURT: But is he eligible to
11 operate his business where he's located?

12 MR. KATZ: Of course, he is. That's
13 what I've been trying to argue to Your Honor
14 the entire time, and we're just -- we're just
15 not closing the gaps so far.

16 Now, we can deal with it. It can be
17 in the Dark Ages of how you define a sexual-
18 oriented business, or somewhere along the
19 line, we can bring things into the light of
20 what the twentieth century's telling us about
21 Supreme Court opinions, or else we're going

1 to have to have everyone who owns a store
2 that has some adult-related videos to pay a
3 whole lot of money to have lawyers to go to
4 federal court. And if that's what it's come
5 to, I guess that's what it's come to.

6 THE COURT: All right.

7 MR. KATZ: But that question was
8 improper because -- because it's a trick
9 question, have you applied for a sexual-
10 oriented business license where you are now,
11 when he's not in a zone that allows that. If
12 -- you're eligible for that in the C-3 and C-
13 4 Zone. My client's in a C-2 Zone. He's in
14 a zone where it's not eligible for an SOB
15 license.

16 THE COURT: Your objection and
17 statement is noted.

18 Proceed, Mr. Green.

19 BY MR. GREEN:

20 Q I just want to know, did you at least
21 try to get a variance from the Board of

1 Zoning Adjustment?

2 A No.

3 Q Do you have an application of any
4 kind pending before the Board of Zoning
5 Adjustment?

6 A No.

7 Q Who was the inspector, sir, that said
8 you could get between 18 and 20 percent of
9 sexually-oriented materials that were
10 permitted? Who -- who told you this?

11 A That's what I heard when we had the
12 hearing in the year 2000.

13 Q You heard it in the hearing? Did the
14 Judge say so? Did your lawyer say so?

15 (Overlapping and inaudible
16 conversation.)

17 A In the questions that the attorney
18 asked to the persons that were there, and the
19 inspectors had the opinion of some 25 other
20 than 18 (ph) -- there was a (inaudible) 15.

21 So I'm not basing it on what the

1 inspector said; I'm basing it on what my
2 attorneys advised me.

3 MR. GREEN: I see. I don't have any
4 other questions, Your Honor.

5 THE COURT: Anything on redirect, Mr.
6 Katz?

7 REDIRECT EXAMINATION BY COUNSEL FOR
8 THE RESPONDENT

9 BY MR. KATZ:

10 Q When Ms. Hicks was working with Adjie
11 O'Bryant, were you aware that she had
12 previously been the District of Columbia's
13 Zoning Administrator?

14 A Yes.

15 Q When did you first learn that, that
16 she had previously been the District of
17 Columbia's Zoning Administrator?

18 A In 1996, when I applied for a
19 license, I had a hearing before her.

20 MR. KATZ: Okay. I have no other
21 questions for my client.

1 MR. GREEN: I have no redirect --
2 rather, recross, Your Honor.

3 THE COURT: What year was that, sir?

4 THE WITNESS: 1996.

5 THE COURT: Sir, how many employees
6 do you have?

7 THE WITNESS: Right now I have four;
8 five, including myself.

9 THE COURT: What are the functions of
10 each employee?

11 THE WITNESS: Sir?

12 THE COURT: The functions; what are
13 the duties?

14 THE WITNESS: One is a cashier and
15 also works the back section. He -- he's the
16 one that's in charge of the -- checking the
17 monitor.

18 The other one is in charge of
19 cleaning the front, and also the back.

20 THE COURT: Is that a full-time job?

21 THE WITNESS: That's right.

1 THE COURT: And the other employees?

2 THE WITNESS: Well, I have two other
3 -- how do you say -- shifts, plus myself.

4 THE COURT: So, you're saying the
5 five employees, four plus yourself, do not
6 work at the same time?

7 THE WITNESS: No.

8 THE COURT: How many shifts do you
9 have?

10 THE WITNESS: Two.

11 THE COURT: And what are the hours of
12 the shifts?

13 THE WITNESS: From -- from Monday
14 through Thursday, it's from 9 to 5, and from
15 5 to 1.

16 THE COURT: Okay. From Mondays to
17 Fridays, it's 9 a.m. to 5 p.m.?

18 THE WITNESS: That's right.

19 THE COURT: And go on.

20 THE WITNESS: Fridays and Saturdays,
21 we don't close those days. They're open 24 -

1 - we're open 24 hours a day.

2 THE COURT: Say that again?

3 THE WITNESS: We don't close those
4 days. We're open 24 hours a day.

5 THE COURT: You don't close upstairs?

6 THE WITNESS: We only operate on one
7 floor.

8 THE COURT: So, am I understanding
9 that you op -- you're operating 24 hours a
10 day?

11 THE WITNESS: Just Fridays and
12 Saturdays.

13 THE COURT: I see. So Monday through
14 Thursday, it's 9 a.m. to 5 p.m.; on Fridays
15 and Saturdays, it's 24 hours; and Sundays?

16 THE WITNESS: On Sundays it's 12
17 midday until 10 p.m.

18 THE COURT: Okay. So, on Mondays to
19 Thursdays, you're not open in the night -- at
20 night?

21 THE WITNESS: Until 1.

1 THE COURT: I thought it was from 9
2 to 5?

3 THE WITNESS: We have those -- we
4 have two shifts.

5 THE COURT: Oh, okay. So, on Monday
6 to Thursday, one shift is 9 to 5; and what is
7 the other shift?

8 THE WITNESS: From 5 to 1.

9 THE COURT: And on Saturdays, 24
10 hours, so that's fine; on Sundays, one shift
11 is 12 to 10; and when is the other shift?

12 THE WITNESS: No, it's closed.

13 THE COURT: So you close at 10
14 o'clock, 10 p.m., on Sundays?

15 THE WITNESS: Correct.

16 THE COURT: Uh-huh (affirmative).

17 When did you reopen this store, sir?

18 THE WITNESS: March 14th, 2001.

19 THE COURT: So, help me out again
20 with these two shifts. Now, you have four
21 employees plus yourself; which shift do you

1 work?

2 THE WITNESS: I do four days, in
3 which it's the third day off. Sometimes I
4 help them out on Fridays and Saturdays only.

5 THE COURT: So, what -- what am I
6 understanding, that he works Monday to
7 Thursday?

8 THE WITNESS: (Inaudible). Something
9 like that.

10 THE COURT: Oh, wait, tell me what it
11 is, not, something like that.

12 THE WITNESS: I work two days in the
13 daytime, and I work two days at night.

14 THE COURT: Between Monday to
15 Thursday?

16 THE WITNESS: Yes.

17 THE COURT: And then on Saturdays?

18 THE WITNESS: Sometimes -- sometimes
19 I'm there seven or eight hours; sometimes I
20 just go home to rest.

21 THE COURT: Do you work Sundays at

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1 all?

2 THE WITNESS: Sometimes -- sometimes,
3 sir.

4 THE COURT: All right. Sir, what
5 kind of income are you generating on -- on
6 each of these shifts; do you know?

7 THE WITNESS: I don't understand.
8 What I earn?

9 THE COURT: Yeah; what kind of
10 monies?

11 THE WITNESS: Do I earn, or they, the
12 employees?

13 THE COURT: No; the business?

14 THE WITNESS: Well, since I opened
15 the business, it's doing pretty badly because
16 they don't want to pay money to go in.

17 THE COURT: You don't want to pay?

18 THE WITNESS: The clients don't want
19 to pay to go inside, so many clients don't go
20 in because of that.

21 THE COURT: But you don't have a

1 number?

2 THE WITNESS: Yes, I have an amount
3 of what I make. I make an average of \$5,500
4 to \$5,700, sir, or \$5,200; it -- it varies.

5 THE COURT: That's per week?

6 THE WITNESS: Yes.

7 THE COURT: And that includes all
8 shifts?

9 THE WITNESS: Everything that the
10 business earns.

11 THE COURT: So, there was mention of
12 Lewis Road?

13 THE WITNESS: Yes.

14 THE COURT: Are you familiar with
15 that business?

16 THE WITNESS: Yes.

17 THE COURT: What effect, if any, does
18 that business have on yours, or vice-versa?

19 THE WITNESS: (No audio.) Also the
20 same people are from corner to corner.

21 THE COURT: All right. No other

1 questions.

2 Anything else, Mr. Katz?

3 MR. KATZ: No, Your Honor.

4 THE COURT: Mr. Green?

5 MR. GREEN: No, Your Honor.

6 THE COURT: All right.

7 One -- one other question. Is there
8 someone that runs the business when you're
9 not there? Is there a manager on duty?

10 THE WITNESS: In the business?

11 THE COURT: Yes.

12 THE WITNESS: There's a CPA that
13 controls all the paperwork.

14 THE COURT: So the CPA works on
15 Sundays, and 24 hours on Saturdays?

16 THE WITNESS: No.

17 THE COURT: Well, who runs the
18 business when you're not there?

19 THE WITNESS: When I'm not there,
20 there's a worker -- a relative of mine. He's
21 the one in charge.

1 THE COURT: And who is he? What's
2 his name?

3 THE WITNESS: His name is Antonio
4 Ventura.

5 THE COURT: So he's running the
6 business as you're here today?

7 THE WITNESS: Exactly.

8 THE COURT: So you and Mr. Ventura
9 are not off at the same time?

10 THE WITNESS: Yes, yes.

11 THE COURT: Yes what?

12 THE WITNESS: He has days off that I
13 have days that I work also.

14 THE COURT: No. My question was, are
15 you off at the same time?

16 THE WITNESS: At times.

17 THE COURT: And if both of you are
18 off, who's running the business?

19 THE WITNESS: (Inaudible.)

20 THE COURT: And what's her name?

21 THE WITNESS: There's another fellow

1 at the office if there's nothing else to do.

2 THE COURT: So that -- say that
3 again? Repeat what you just said, sir?

4 THE WITNESS: That's another a
5 worker, the ones that work with me. His name
6 is Santos E.R. Melindez (ph).

7 THE COURT: All right. No other
8 questions.

9 MR. KATZ: I have none.

10 THE COURT: None.

11 MR. GREEN: I don't either, Your
12 Honor.

13 THE COURT: All right. What's the
14 government's position on Mr. -- Mr. Bello?

15 MR. GREEN: He's still at a meeting
16 and a hearing, Your Honor. That's the
17 problem.

18 THE COURT: All right. And you don't
19 know what his schedule is like on Friday
20 either at this point?

21 MR. GREEN: I can know in the

1 morning. That's about the best I can do,
2 Your Honor. I can know in the morning.

3 I can go around the corner here and,
4 you know, try and find out whether anybody
5 knows anything or (inaudible).

6 THE COURT: How long -- how much time
7 do you think you need with Mr. Bello?

8 MR. GREEN: Twenty minutes. I just
9 have two questions for him, and one document.
10 And I have no idea what counsel for the
11 opposition has -- has in mind.

12 And I can tell you ahead of ahead of
13 time, the document (inaudible) the zoning
14 opinion.

15 THE COURT: Uh-huh (affirmative).

16 MR. GREEN: He's -- he's -- he just -
17 -

18 MR. KATZ: (Inaudible.)

19 MR. GREEN: Huh?

20 MR. KATZ: Is he -- (inaudible).

21 MR. GREEN: Yeah. He's the -- he's

1 the current Zoning Administrator. I mean,
2 you know, he's -- he -- he -- he is within
3 his purview to either be -- (no audio) -- or
4 change it, or whatever, but that's the
5 current opinion that's on the table.

6 THE COURT: All right. Mr. Katz?

7 MR. KATZ: Yes, Your Honor.

8 THE COURT: Mr. --

9 MR. KATZ: Adjie O'Bryant?

10 MR. COURT: -- O'Bryant, how long --

11 MR. KATZ: I don't expect to be any
12 more than 10 to 15 minutes on direct with
13 him, and he's a very rapid, direct person, so
14 he cuts to the chase.

15 THE COURT: Okay. And Mr. Wright?

16 MR. KATZ: Probably about the same,
17 about 10. And there's a chance I'm going to
18 be able to -- if I can get Mr. O'Bryant, I
19 may not need Mr. Wright. I'll have a better
20 flavor of that between now and Friday. But
21 even if we use both of them, we're not

1 talking about more than 20 minutes direct
2 (inaudible).

3 THE COURT: Okay. I would like -- I
4 -- I just wanted to mention just an
5 observation then. The Respondent sat through
6 this entire day listening and understanding
7 just about everything that was going on, and
8 the interpreter came in very late.

9 The Respondent attended the last
10 hearing, sat through about -- I guess, about
11 the same time, if not longer, and understood
12 everything that went down. I noticed when
13 the interpreter was speaking to him, a lot of
14 times he answered in English, which seems to
15 suggest he understood the questions that were
16 being asked. But that's just an observation.

17 MR. KATZ: And I'm happy you brought
18 it up, because although I regret that you
19 feel that way, it's better that I know than
20 that I don't know.

21 What I know is this: In each

1 (inaudible) -- and it happens again and again
2 and again, where there are people who spend
3 how many years -- they can understand the
4 basics. But when it comes down to matters of
5 life and health, keeping their business, they
6 need the precision.

7 Every time he comes to my office,
8 even though I speak maybe close between
9 beginner and intermediate Spanish, when
10 Sandra's (ph) there, my bilingual assistant,
11 she's there to help. And I'm not going to
12 use her to help in getting interpretation if
13 I don't need it, because she's our only
14 support staff member, and that means that
15 she's not available.

16 You know that anytime that I speak
17 with Mr. Montiel, even though I speak it
18 (inaudible) a lot of Spanish, there's a lot
19 that gets lost in the translation.

20 Now, I -- I don't -- I don't know you
21 much before today, Your Honor, other than

1 speaking to you, saying hello when you're
2 going to your office, but I do know that from
3 my experience, the more I know people who
4 speak a second language, I -- I know that
5 there is a false concept in too many people's
6 minds that, you know, why do you need the
7 interpreter, you're just trying to make like
8 you don't understand. And it disappoints me,
9 because things are a lot more complex than
10 that when it comes to speaking a second
11 language.

12 My second language is French. I've
13 been speaking it for 26 years. To this day,
14 I can't sit through a French movie and
15 understand one-tenth of what goes on if I
16 don't read the subtitles.

17 And I'm the talkative one, for better
18 or worse. And so if I was the talkative one,
19 and not good enough in French without a help
20 -- you know, most folks are just regular
21 folks like my client, they need help. So, I

1 mean, whatever we can do to spell that out
2 (inaudible).

3 You know, I offer my secretary, my
4 paralegal, to go on the witness stand to
5 confirm she's always there to interpret him
6 for us when he comes in.

7 MR. GREEN: Your Honor, may I be
8 heard?

9 THE COURT: Yes, Mr. Green.

10 MR. GREEN: You know, I -- I hear
11 what he said, and I -- and I -- and I really
12 sympathize with what he said, and I would be
13 more sympathetic to what he said if the
14 Respondent were not represented the last time
15 by counsel.

16 Now, Respondent was represented the
17 last time, not by one, but two, lawyers.

18 (End of tape 6, side B.)

19 (Start of tape 7, side A.)

20 MR. GREEN: Now, there's a reason one
21 walks in the door with a lawyer. But when

1 one walks through the door with two lawyers
2 who (inaudible) and assist him, and
3 understand what the client's needs are and
4 understand the law, the sympathy that we have
5 is somewhat dissipated.

6 Now, he's making a plea about, my
7 client doesn't understand English too well,
8 and I have to get an interpreter. I don't
9 doubt it. I don't doubt it. He has a
10 problem, maybe.

11 But we can't overcome the fact that
12 he was represented by counsel, not one, but
13 two lawyers. How many respondents come
14 before this tribunal represented by two
15 lawyers, both of whom weren't beginners in
16 the trade, both of whom who have been in the
17 practice for quite a few years? And they
18 provided pretty competent legal assistance.
19 I don't think that's going to be lost on the
20 Court.

21 THE COURT: All right.

1 I will continue this matter until 10
2 o'clock on Friday.

3 MR. KATZ: As I told you, Mr.
4 O'Bryant said he can make himself available
5 in the afternoon, and he's going to have to
6 switch around his schedule then. He's not
7 available in the morning. I told Your Honor
8 that since the beginning of this morning.

9 When there's a death penalty case --
10 and I hope you realize, Your Honor, it's
11 going to be an awful lot harder to get out of
12 that than if it's just a shoplifting case.

13 And I can be here at 10, but as far
14 as my witness, he needs to be afternoon.

15 THE COURT: All right. We'll set it
16 for 1 o'clock on Friday.

17 Mr. Green?

18 MR. GREEN: I will talk to Mr. Bello
19 tomorrow morning, and make sure that he
20 understands.

21 THE COURT: All right. Mr. Katz?

1 MR. KATZ: My preference is, for
2 safety sake, to ask for 2 o'clock, but if
3 you're saying 1, I mean, you know, the same
4 thing with me, I'm -- I'll immediately get in
5 touch with Mr. O'Bryant and ask him --

6 (Overlapping and inaudible
7 conversation.)

8 THE COURT: And we -- we have three
9 potential witnesses, and I want to -- not to
10 complete it on -- on that day. I will set it
11 at 1 o'clock.

12 There will be no written notices with
13 respect to Friday. It's on the record.
14 Everyone has been notified to be here at 1
15 o'clock. Please come to the main Office of
16 Adjudication, and we'll be ready to go at 1.

17 MR. KATZ: Thank you, Your Honor.

18 MR. GREEN: Thank you, Your Honor.

19 THE COURT: Let the record reflect
20 that it is now 5:28 -- okay, 5:26 p.m., and
21 this hearing is concluded.

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1 (Whereupon, at 5:26 p.m., the hearing
2 concluded, to reconvene on Friday, March 8,
3 2002, at 1 p.m.)

4 -oo0oo-

5

CERTIFICATE OF TRANSCRIPTIONIST

I, Mary Joyce Eisenhower,
transcriber, do hereby certify that the
preceding excerpt of trial proceedings is a
verbatim transcript of the proceedings had,
to the extent the quality of the audiotape
recording supplied by the Court will allow.

A handwritten signature in cursive script, reading "Mary Joyce Eisenhower", is written over a horizontal line.

MARY JOYCE EISENHOWER

-00000-

E

ORIGINAL

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION
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:
Department of Consumer :
And Regulatory Affairs :
:
:
V. 01-OAD-2626-E, NOI#028120
01-OAD-2541-G, NOI#035446
:
J.M.M. Corporation :
T/A Fun Fair Video Re. 919 5th Street, N.W.
Washington, DC 20001
:
:
Respondent :
:
-----X

Friday, March 8, 2002

Recorded Proceedings:

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17504
EXHIBIT NO. 33E



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Silver Spring, Maryland 20910

C O N T E N T S

Testimony of

Witness

EXHIBITS

Exhibit No.	Page
Government No.	
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P R O C E E D I N G S

THE COURT: This is March 8, 2002;
the time is 1:17 p.m.

This is a continuance into the matter
of J.M.M. Corporation, trading as Fun Fair
Video. This was continued from Tuesday,
March the 5th.

For the record, appearing again on
behalf of the Government?

MR. GREEN: My name is Matthew J.
Green, Jr.

THE COURT: And on behalf of the
Respondent?

MR. KATZ: Good afternoon. Jonathan
Katz, representing Jose Montiel, who is
present.

THE COURT: And --

MR. VOICE: (Inaudible.)

THE COURT: Very well.

This is Lennox Simon, Administrative

1 Law Judge, joined by Administrative Law Judge
2 Rory (ph) Smith.

3 We have some preliminary matters, Mr.
4 Green?

5 MR. GREEN: Yes, Your Honor. I've
6 been in contact with my other witness, Mr.
7 Tory Bellow, and Mr. Bello, who is the Acting
8 Zoning Administrator, indicated to me, in the
9 presence of Your Honor's, I guess, Scheduling
10 Clerk, that he's going to be delayed for
11 about 10 minutes or so, mainly because his
12 office is short-staffed, and he's the only
13 person down there right now, and that's the
14 problem.

15 THE COURT: All right. But he's in
16 the building?

17 MR. GREEN: He is in the building
18 physically.

19 THE COURT: Okay.

20 MR. GREEN: And Your Honor's
21 Scheduler can attest to the fact that he

1 talked to her on the telephone.

2 THE COURT: All right.

3 MR. GREEN: Well, he talked to me on
4 -- on a speaker phone, and he talked to both
5 of us.

6 THE COURT: All right. That's your
7 only preliminary matter?

8 MR. GREEN: Yes, Your Honor.

9 THE COURT: Any preliminary matters,
10 Mr. Katz?

11 MR. KATZ: Yes. I have my witness,
12 Adjie O'Bryant, who I expected to be here by
13 now, but his paralegal did indicate yesterday
14 to me that he was planning on being here --
15 she used the words, around 1. I said, well,
16 you really have to be here -- have him be
17 there right at 1, please get that message to
18 him. I had communicated to him 1 o'clock.

19 So -- so I would like to take the
20 time while we're waiting for Mr. Bello to see
21 if he left a message on my cell phone,

1 because my cell phone's turned off right now.

2 THE COURT: So you are expecting one
3 witness?

4 MR. KATZ: Right.

5 THE COURT: And the Government's
6 expecting one witness?

7 MR. GREEN: That's correct, Your
8 Honor.

9 MR. KATZ: And I'm also planning
10 putting Mr. Montiel back on the stand briefly
11 about one narrow matter, but...

12 THE COURT: (Inaudible.)

13 It was my hope after the hearing to
14 go to lunch --

15 MR. GREEN: (Inaudible.)

16 THE COURT: -- but --

17 MR. GREEN: That's why I eat
18 beforehand, Your Honor.

19 THE COURT: Lucky you.

20 MR. GREEN: The last time, I got
21 mouse-trapped, so I...

1 THE COURT: Okay. I guess we can
2 both miss a meal together.

3 MR. GREEN: Yes, we can, Your Honor.
4 (Laughter.)

5 MR. KATZ: I don't think you want to
6 know what I eat (ph).

7 THE COURT: No. I'll go off the
8 record for about 10 minutes.

9 MR. GREEN: All right. And I'll work
10 -- work on my --

11 THE COURT: Off the record for 10
12 minutes --

13 MR. GREEN: All right, Your Honor.

14 THE COURT: It's 12 -- it's 1:20.

15 (Off the record.)

16 THE COURT: All right, we're back on
17 the record at 1:35 p.m., and we're now
18 (inaudible) by the Government's witness.

19 Can I get you to state your name for
20 the record?

21 MR. BELLO: For the record, Tory

1 Bello, (inaudible).

2 THE COURT: Can I get you to raise
3 your right hand?

4 (Witness sworn.)

5 MR. KATZ: Your Honor, I have a brief
6 preliminary matter.

7 THE COURT: All right, uh-huh
8 (affirmative).

9 MR. KATZ: I -- I was called by my
10 witness, and he said he's 15 to 20 minutes
11 away, so I hope that we're not going to have
12 much of the wait time between the time this
13 witness finishes and my witness gets here.

14 THE COURT: It's 35 minutes already,
15 but we'll see how long --

16 MR. KATZ: I did everything I could
17 within my power, Your Honor, ever since --
18 ever since before (inaudible).

19 THE COURT: All right.

20 Okay, Mr. Green?

21 MR. GREEN: Yes, Your Honor.

DIRECT EXAMINATION BY COUNSEL FOR
THE GOVERNMENT

BY MR. GREEN:

Q For the record, sir, Mr. Bello, by
whom are you employed?

A The District of Columbia Government
(inaudible).

Q And in what capacity?

A Currently the Acting Zoning
Administrator.

MR. GREEN: And I ask the Court to
take notice of what the Zoning Administrator
does.

BY MR. GREEN:

Q Maybe, for the record, you might want
to briefly state what your functions and
roles are?

MR. KATZ: I'll object to taking any
notice that's not been on the record.

THE COURT: All right.

MR. GREEN: What -- I don't know what

1 you said. What -- what did you say now? I
2 didn't hear you.

3 MR. KATZ: I'm sorry you didn't hear me.

4 MR. GREEN: Well, I think that if I'm
5 going to be responsive to you, I've got to
6 hear and understand what you said.

7 Your Honor, I ask this man to please
8 restate what -- what his objection is.

9 THE COURT: Would you repeat your
10 objection, Mr. Katz?

11 MR. KATZ: I heard Mr. Green ask for
12 the Court to take notice of the function Mr.
13 Bello does. I do not have intimate
14 familiarity with it, and so that is unfair
15 for there to be notice of anything he does
16 that's not on the record. It's unfair to
17 take notice of anything that's not on the
18 record without at least assuring that I'm
19 familiar with it.

20 MR. GREEN: Your Honor, in one of the
21 things that I've said, if he'd listened

1 clearly, was that I asked Mr. Bello to
2 explain and define what his functions were --

3 THE COURT: All right.

4 MR. GREEN: -- so that there would be
5 clarify. Now --

6 THE COURT: All right, Mr. Green.
7 Mr. Green, that's fine. Just -- just proceed
8 --

9 MR. GREEN: Yes, Your Honor.

10 THE COURT: With Mr. Bello.

11 BY MR. GREEN:

12 Q Mr. Bello, again, please tell us what
13 the Zoning Administrator does in the District
14 of Columbia?

15 A The Zoning Administrator has the
16 responsibility for the interpretation and the
17 enforcement of the zoning regulations.

18 Q I see. With that in mind, do you
19 have any familiarity with a concept known as,
20 not sexually-oriented?

21 MR. KATZ: Objection.

1 THE COURT: What's the objection?

2 MR. KATZ: It's not a term of legal
3 art. The term of legal art is sexual-
4 oriented business enterprise. That's our
5 business establishment (inaudible) there's no
6 relevance in that question.

7 MR. GREEN: Well, Your Honor, we have
8 on a Certificate of Occupancy the term, not
9 sexually-oriented.

10 Now, either -- if this man is the
11 Zoning Administrator, he can tell us what it
12 means.

13 MR. KATZ: You might as well dismiss
14 the case then if the certificate only says
15 that, because that means the D.C. Government
16 mistake -- mistake in not putting the term of
17 art there. It was just from DCMR 199.1,
18 which is sexual-oriented business
19 establishment.

20 THE COURT: Let me hold up a minute
21 here.

1 (Discussion off the record.)

2 THE COURT: Okay, we'll continue in
3 the matter of J.M.M. Corporation trading as
4 Fun Fair Video. This is PDR (ph) Number 2.

5 MR. GREEN: Your Honor, do you happen
6 to have the exhibits?

7 THE COURT: Yes, I do. Which
8 exhibits are we talking --

9 MR. GREEN: I'm looking for the
10 Certificate of Occupancy issued to the
11 Respondent.

12 THE COURT: That one's Exhibit Number
13 2.

14 MR. GREEN: Thank you.

15 BY MR. GREEN:

16 Q Mr. Zoning Administrator, I'm going
17 to show you what's been marked and admitted
18 into evidence as Government's Exhibit Number
19 2, and I direct your attention to language
20 based on a definition or a statement we made,
21 that we talked about not sexually-oriented.

1 Now, when you look at this
2 Certificate of Occupancy, what -- what --
3 what do you see?

4 A I see a Certificate of Occupancy
5 issued to J.M.M. Corporation to establish a
6 video membership store, but it's not
7 sexually-oriented.

8 Q What does that mean, sir?

9 MR. KATZ: Objection.

10 THE COURT: What's the objection?

11 MR. KATZ: This -- this witness
12 hasn't been qualified as knowing what that
13 means. He hasn't been qualified about what
14 his -- what his main duties have been during
15 the short time he's been Acting
16 Administrator. He hasn't qualified about
17 what he knows about the law.

18 If we were in a court of law, he
19 wouldn't even be here, because what I
20 understand is he's here to give an
21 interpretation, and that's a sham for the

1 law, and that's very embarrassing to me for
2 that to happen both as a lawyer and as a
3 citizen and, not just a citizen, but as a
4 resident for a long time in the District of
5 Columbia.

6 I'm trying to keep some level of
7 fairness here. If I'm not going to get it
8 from -- from the Bench, I'm at least going to
9 get it on the record.

10 THE COURT: Your response, Mr. Green?

11 MR. GREEN: Your Honor, I haven't the
12 foggiest idea what he's talking about. I
13 mean, we're down here -- I mean, he's been
14 talking about everything from the
15 Constitution to the assassination of Abraham
16 Lincoln.

17 Now, we -- we're trying to get some
18 semblance of understanding of what is meant
19 by not-sexually-oriented, and particularly as
20 it's printed on his Certificate of Occupancy.

21 We have here the man who is the

1 Zoning Administrator. Now, he has -- if he
2 doesn't know, if he can't define, then I
3 don't think anybody in this room really
4 define.

5 And if we're not going to listen to
6 him, if we're not going to give him an
7 opportunity to explain himself, then I don't
8 think that -- that we're -- we're going to
9 get too far.

10 Now, you know, if you allow me to ask
11 a couple of questions for Mr. -- Mr. Tory
12 Bello, I think we can straighten some of this
13 up.

14 MR. KATZ: Just to complete my -- my
15 objection, citing FWPBS Incorporated versus
16 City of Dallas, 493 U.S. 214, page 225, from
17 1990, where the Supreme Court said, "Cases
18 addresses prior restraints have identified
19 two evils that will not be tolerated in such
20 schemes. First, a scheme that places
21 unbridled discretion in the hands of a

1 government official or agency constitutes a
2 prior restraint and may result in censorship.
3 Second, a prior restraint that" -- killed --
4 sorry -- "...a prior restraint that fails to
5 place limits on the time within which the
6 decision-maker must issue the license is
7 impermissible."

8 What -- what Mr. Green is trying to
9 do, what -- what the effort has been from the
10 Government the entire time of this
11 adjudication that I've been trying to get
12 dismissed is violate those dictates from the
13 Supreme Court which, if you're going to have
14 a scheme, it's going into the First Amendment
15 rights of adult video stores and adult
16 business.

17 You do it the right way. You write
18 it in clear words on paper, get it passed
19 through legislation. You have the secondary
20 effects studies happen, and you don't have
21 the sham of having an administrator come in

1 and interpret it -- and give an
2 interpretation that hasn't even necessarily
3 been announced.

4 The Supreme Court is two miles away
5 from us -- the world deciding, not me -- but
6 -- but Mr. Green and the Government has
7 decided to just ignore the Supreme Court, and
8 that's what's so embarrassing here today.

9 MR. GREEN: Your Honor, I don't care
10 if my -- if Mr. Katz runs up and down the
11 street -- (no audio) -- naked. It doesn't
12 matter what the -- what he does. I don't
13 care. I don't think the Government cares.

14 But what we do care about is if he's
15 going to run up and down the street naked,
16 that he run up and down the street naked in
17 the proper area zoned for running up and down
18 the street naked.

19 Now, we're not here to decide or --
20 or -- or consider the First Amendment.
21 That's not what this issue is all about.

1 This is a notice of infraction for having a
2 Certificate of Occupancy which says, not
3 sexually-oriented and, in fact, running an
4 establishment which is in fact sexually-
5 oriented in the wrong area zoned for that.

6 We've also brought out, and I -- I've
7 made the point very clear, Your Honor, that
8 if you want to operate in a not -- a not-
9 sexually-oriented zoned area a sexually-
10 oriented business, then you must seek a
11 variance someplace, and that's before the
12 Board of Zoning Adjustments.

13 We're not saying that -- that --
14 we're not even getting into the question of
15 probably restraining his client's ability to
16 express himself, if that's what we're trying
17 -- he's trying to say. What we're saying is,
18 you can't do it at 919 5th Street, Northwest,
19 Washington, D.C. That's all we're saying.
20 We're saying that if you want to do something
21 different, then go to the City Council and

1 change the law, you know, or go into an area
2 that's zoned for the kind of activities he is
3 seeking. That's all we're saying, Your Honor.

4 THE COURT: Anything else?

5 MR. KATZ: Yeah. I'm saying the case
6 law -- I hope you read some of it, what I
7 gave you three days ago -- totally says Mr.
8 Green is wrong.

9 We have the cases of Renton (ph) from
10 the 1980's. We have the case of Erie versus
11 Pennsylvania, which says that the only way
12 you get to a con -- a content neutrality form
13 of analysis of whether the law is legal when
14 it comes to adult entertainment, or alleged
15 adult entertainment, is you dot the i's and
16 cross the t's.

17 And if you don't have a legislative
18 record, or at least a regulatory record, that
19 shows the secondary effect studies were
20 properly relied upon, and that you do not
21 have each administrator telling us what the

1 law means, you have it written down for
2 judges to decide what it means, then it's a
3 sham and it's unconstitutional.

4 THE COURT: All right. I've heard
5 your arguments. I will allow the question
6 and -- to continue, so your objection is
7 noted, but overruled. Let's go.

8 BY MR. GREEN:

9 Q Sir --

10 MR. KATZ: Excuse me one second. I
11 think my assistant --

12 THE COURT: He'll -- he'll get it.
13 Just open it on -- (inaudible).

14 BY MR. GREEN:

15 Q Sir, you were about to tell us about
16 this phraseology on a Certificate of
17 Occupancy and what it meant.

18 MR. KATZ: May I please have a
19 continuing objection?

20 THE COURT: Very well.

21 THE WITNESS: The general regulation

1 provides a definition for what a sexually-
2 oriented establishment constitutes and, in so
3 noting on the Certificate of Occupancy, the
4 applicant implies that they are not meeting
5 that definition of the operation of
6 standards.

7 BY MR. GREEN:

8 Q I see. Now, how did you arrive at an
9 understanding of what constitutes sexually-
10 oriented; because the law says -- it doesn't
11 -- it doesn't even allow any sexual-oriented
12 operation; is that right?

13 A Not that --

14 MR. KATZ: Objection. How much lead
15 am I going to have today? This is the
16 Administrator who's supposed to be so
17 knowledgeable; why is he being led in this
18 fashion?

19 THE COURT: Rephrase the question,
20 Mr. Green.

21 MR. GREEN: Thank you, Your Honor.

1 BY MR. GREEN:

2 Q Mr. Bellow, in terms of the law, as
3 you understand it, what, if any, provisions
4 are made that allow, or don't -- or disallow,
5 I should say -- the kinds of activities that
6 the J.M.M. Corporation is engaged in from
7 taking place where it's currently located?

8 MR. KATZ: Objection.

9 THE COURT: Mr. Katz?

10 MR. KATZ: No proper foundation shown
11 that this witness knows anything about J.M.M.
12 Corporation, that he knows enough to testify
13 about it yet.

14 BY MR. GREEN:

15 Q Have you heard of J.M.M. Corporation,
16 sir?

17 A Yes, sir.

18 Q And how are you familiar with it?

19 A In the course of several years of
20 enforcement acts of the subject premises.

21 Q And did their come a time when your

1 agency --

2 MR. KATZ: That's not responsive.

3 THE COURT: Why not?

4 MR. KATZ: That doesn't tell what his
5 personal knowledge is. We have the witness
6 here. He's supposed to be testifying about
7 his personal knowledge. And if he doesn't
8 have full personal knowledge, he should be
9 telling us about where he's getting his
10 knowledge from.

11 Otherwise, his testimony's useless.
12 Otherwise, he can't -- otherwise, his -- the
13 reliability of the testimony can't be waived
14 if we don't know the extent to which he has
15 First Amendment --

16 THE COURT: Let me make that
17 determination, Mr. Katz. Your objection is
18 noted.

19 Proceed, Mr. Green.

20 BY MR. GREEN:

21 Q Do you have personal knowledge of

1 J.M.M. Corporation?

2 A Yes, I do, sir.

3 Q And how do you have this, sir?

4 A I worked in -- there's a record of
5 extensive enforcement acts on the subject
6 premises, and subject premises has been
7 before the Board of Zoning Adjustment, so the
8 hearings of the Board and the seeking of
9 relief to establish a -- a sexually-oriented
10 establishment is a matter of public record.

11 MR. KATZ: Objection. That's not
12 firsthand knowledge. Let the witness call it
13 what it is.

14 THE COURT: Your objection is noted.
15 Just -- just proceed Mr. Green.

16 MR. GREEN: Yes.

17 THE COURT: Overruled.

18 MR. GREEN: Yes, Your Honor.

19 BY MR. GREEN:

20 Q Did there come a time, sir, when you
21 directed an investigation or inspection of

1 the premises?

2 A Yes, sir. Upon further complaints
3 about the continuance of similarly
4 established activities, a Zoning Inspector
5 was dispatched to this location.

6 Q And who was that Zoning Inspector,
7 sir?

8 A Mr. Ali James (ph).

9 MR. GREEN: All right.

10 Let the Court again take note that
11 Mr. James gave testimony in this proceeding
12 relative to this establishment.

13 BY MR. GREEN:

14 Q Now, when Mr. James brought back a
15 report, and ultimately issued a notice of
16 infraction, what, if any, relationship to
17 that infraction did you get involved with?

18 A Mr. James actually called back to the
19 office to apprise me of his observations on
20 premises. Given the information that he
21 shared with me, I instructed him to go ahead

1 and issue a notice of infraction, as though
2 that, too -- clearly exceeded --

3 MR. KATZ: Objection.

4 THE COURT: Mr. Katz?

5 MR. KATZ: That wasn't here before
6 (ph). I mean, how (inaudible) are we going
7 to have to keep this a fair hearing?

8 MR. GREEN: Your Honor, again, not --
9 not only is it an administrative proceeding,
10 but it -- the -- if it's hearsay, it has to
11 be of probative value and material, and it is
12 material.

13 It was stated, obviously, that Mr.
14 James is a employee of Mr. Bello. Mr.
15 Bello's his supervisor. And it was stated
16 that Mr. James gave testimony. Your Honor
17 himself swore Mr. James in.

18 Mr. Bello certainly can talk about
19 the instruction and the discussion that he
20 had with one of his own employees. That
21 seems to be pretty straightforward, and it --

1 it certainly is firsthand knowledge on the
2 part of Mr. Bello. I mean, if it's not, then
3 I think that we move on it.

4 MR. KATZ: You know my view, Your
5 Honor. It's being incorporated by reference.

6 THE COURT: Proceed, Mr. Green.

7 BY MR. GREEN:

8 Q Mr. Bello, when you gave this
9 instruction to Mr. James, were you basing it
10 on any standard?

11 A I was basing it on the standard of
12 what's a sexually-oriented establishment is
13 being defined as a result in the regulations
14 (ph).

15 Q And had that standard been further
16 amplified by any other writings or documents?

17 MR. KATZ: Objection.

18 THE COURT: Mr. Katz?

19 MR. KATZ: As far as I know, there's
20 been no -- not -- notice of comment period on
21 any amplifications. So if Mr. Green intends

1 to bring in Ms. Hicks' opinion, you know,
2 then we're topping unfairness on top of
3 unfairness.

4 My understanding of Ms. Hicks'
5 decision is twofold. Number one was that it
6 didn't go through proper formal notice-of-
7 comment channels.

8 And number two, when my client was
9 before you a year and a half ago or more, Mr.
10 Johnson, who was at that time Zoning
11 Administrator, said, I'm not even bound by
12 what my predecessor said, and that's the best
13 part of why -- why there are no standards to
14 even have -- to even justify us being here
15 today, because each Administrator decides
16 what they want to do. They decide whether
17 they want to accept some of the previous
18 Administrator's position or not.

19 Let's not be disingenuous about this.
20 Let's have a nice open way of deciding what
21 our sexual-oriented business regulations are

1 going to be like.

2 THE COURT: All right. Objection
3 noted.

4 Proceed, Mr. Green.

5 MR. GREEN: Well, that really was --
6 it was the next question, sir.

7 BY MR. GREEN:

8 Q Can you tell us about this opinion
9 that Mr. Katz has made reference to?

10 A Well, the opinion, basically,
11 explains in detail the parameters of the
12 definition of a sexually-oriented
13 establishment, so it was really not
14 inactivating (ph) new regulations that was
15 not in existence. But it pretty much takes
16 as a matter of percentage of inventory, and
17 what an establishment can have in order not
18 to be considered as a sexually-oriented
19 establishment.

20 MR. KATZ: Sir, please give me a
21 continuing objection, Judge?

1 THE COURT: Very well, Mr. Katz.

2 (End of tape 7, side A.)

3 (Start of tape 7, side B.)

4 THE WITNESS: ...details specific
5 activities that may pretty much make an
6 establishment sexually-oriented.

7 BY MR. GREEN:

8 Q What are the activities that make a -
9 - an establishment a sexually-oriented one,
10 particularly with regard to the statutes?

11 MR. KATZ: Objection. There's no
12 statutes on this; it's regulations.

13 BY MR. GREEN:

14 Q Regulations then?

15 A Clearly, where there's a viewing of
16 sexually-oriented videos on the premise,
17 regardless of the percentage of their
18 inventory, that establishment constitutes a
19 sexually-oriented establishment.

20 Q With respect to 919 5th Street, what,
21 if any, activities took place there that

1 would constitute such?

2 A The observation of the Zoning
3 Inspector was that there was viewing of
4 sexually-oriented videos on premise, and --
5 and clear activities of self-masturbation.

6 Q Is that permitted under the statute?

7 A Absolutely not, sir.

8 Q Has there been a percentage of
9 sexually-oriented activity permitted, as you
10 understand it, according to any regulation?

11 MR. KATZ: Your Honor, please let me
12 just have a continuing objection on what this
13 witness is talking about; it will save us a
14 whole lot of time?

15 THE COURT: Your objection is noted.
16 Proceed.

17 THE WITNESS: The -- the percentage
18 of hard inventory of not the sole and single
19 test for determining what constitutes a
20 sexually-oriented establishment.

21 Clearly, specific activities,

1 regardless of your percentage of inventory
2 would allow the crossing of a threshold of
3 the type of activity that one my otherwise
4 not consider to be sexually-oriented.

5 BY MR. GREEN:

6 Q With regard to the premises in
7 question, the activities that you just
8 described, would they fall within that category?

9 A Absolutely, sir.

10 Q And -- and based on that, is that why
11 a citation's been issued?

12 A That is correct.

13 Q Can you tell us what -- what impact,
14 if any -- and there was an allusion to a
15 Zoning Administrator's previous opinion --
16 what impact, if any, does that have on your
17 decision at this time?

18 A Well, the -- the (inaudible) full
19 weight of the opinion, because the opinion
20 does nothing but explain the parameters of
21 what the definition of an existence of a

1 zoning regulation it's to establish, I
2 believe, then to (inaudible).

3 MR. GREEN: I'm going to have this
4 document marked as Government's Exhibit, I
5 guess, 7.

6

7 (Government Exhibit No. 7, marked
8 for identification.)

9 MR. GREEN: Excuse me?

10 MR. KATZ: I have it.

11 MR. GREEN: I know you do. I just
12 wanted to make sure you see this -- you don't
13 think I'm giving you something you don't
14 have.

15 MR. KATZ: Thank you.

16 MR. GREEN: All right.

17 BY MR. GREEN:

18 Q Sir, I'm going to show you what's
19 been marked as Government's Exhibit Number 7.
20 Can you tell me what that is, please?

21 A It's an opinion of the Zoning

1 Administrator, detailing whether resale or
2 wholesale video stores selling or renting
3 sexually-oriented materials -- (no audio) --
4 in a sexually-oriented establishment
5 (inaudible).

6 Q And that's the document that both
7 counsel and -- and you have referred to and
8 revolved (ph) in talking about; is that
9 right?

10 A That is correct. (Inaudible.)

11 MR. GREEN: I'm going to move
12 admission of that document, Your Honor.

13 MR. KATZ: Objection.

14 THE COURT: Mr. Katz?

15 MR. KATZ: Well, let's see, first of
16 all, as far as reliability of even letting - -
17 letting this in -- and I can't even cross-
18 examine her because she's not here.

19 (Overlapping and inaudible
20 conversation.)

21 Does the witness wish to me to wait

1 for him to finish talking? Okay.

2 THE COURT: Wait, wait, wait, Mr.
3 Katz.

4 MR. KATZ: Okay. She's the Acting --
5 it was the Acting Zoning Administrator, and
6 that's to carry weight about the reliability.
7 Why is someone an Acting Zoning Administrator
8 rather than the Zoning Administrator? It
9 raises questions about how -- how much
10 credence the Government even placed in the
11 person.

12 Second of all, once again, how do we
13 incorporate by reference everything that I've
14 said about FWPBS in the Supreme Court, for us
15 to allow a person who administers the law
16 regarding adult businesses to give their
17 interpretation about anything means makes it
18 unconstitutional and makes it unbridled
19 discretion in that administrator.

20 That's not the way the Supreme Court
21 said you do it. The Supreme Court said that

1 if you're going to regulate adult businesses,
2 you properly pass your ordinance -- and I
3 don't even think that it's proper to even
4 have a regulation from an agency -- you pass
5 your ordinance in the City Counsel, in the
6 Senate, in the House, whatever, the elect --
7 the elected officials.

8 And then you have the Courts decide
9 what the interpretation is, not the
10 administrator; not the administrator from the
11 same place that -- that sets the rules.

12 So this is useless for us to have
13 this opinion in.

14 Second of all, I'm hearing this part
15 about booths, and let's talk about booths in
16 this opinion. Let's go to City of Los
17 Angeles versus Alameda (ph) Books,
18 Incorporated, 222-F-3rd-719, Ninth Circuit,
19 2000, cert granted 1-21-S, Supreme Court 12-
20 23-2001; argued early December 2001, decision
21 pending.

1 Ninth Circuit addresses the ordinance
2 in Los Angeles that said, if you have an
3 adult video store, he can't have booths in
4 the same premises. If he can have booths,
5 they have to be separate from where the adult
6 video store is. The Ninth Circuit said,
7 hogwash; you don't have any secondary effect
8 studies showing that -- that video booths are
9 any more harmful than a regular book store in
10 video store. That's up in the Supreme Court
11 right now.

12 So, what Mr. Green is trying to do is
13 get an opinion here that's going to turn us
14 back 200 years, to the old days, when we
15 didn't have fairness and we didn't have the
16 First Amendment.

17 You are the Judge. You're the one
18 who decides whether you're going to consider
19 the First Amendment or not. But if there are
20 no limits to this, I don't know why we're
21 here. I really don't. I don't know why

1 we're putting this -- this report into
2 evidence. It's worthless. Under the law,
3 and under the First Amendment, it is
4 worthless, and it does -- it's not worth more
5 than the value of the paper it's written on,
6 before anything went on there.

7 THE COURT: Any response, Mr. Green?

8 MR. GREEN: Yeah. You know, I hate
9 to keep talking about (inaudible) the point.

10 We're not here to talk about the
11 First Amendment. That's not the issue.
12 We're not telling this man that he can't do
13 whatever it is that he wants to do within the
14 bounds of the law. All we're saying is, you
15 can't do it in this zone. This is not the --
16 this is not the place.

17 Now, if he can (inaudible) -- you
18 know, if there's another place in the
19 District, you know, fine; the zone for that
20 sort activity, fine.

21 If he wants to stay where he wants to

1 stay, then you seek a variance. You go to
2 the Board of Zoning Adjustment, and you make
3 your case before them. If that does not
4 work, you go to the City Council, and you go
5 there and you try to change the law. That's
6 what you do.

7 What we're trying -- what we've got
8 going on here is, we got an individual who's
9 trying to force the agency, through you, to
10 make him be accepted in an area where the law
11 says that you're not accepted; you can't stay
12 there and do this. That's all. That's the
13 simple nuts and bolts of what we've got.

14 Now, the tragedy is we have films,
15 materials and other characterizations which
16 depict and describe or specify sexual
17 activity, specify the anatomical areas. I
18 mean, we've got all this going on in this
19 store. They're -- they're selling items,
20 they got videos and they got booths, which
21 also sell things which are sexually-oriented,

1 which is sex X-rated. You heard the
2 investigator say this; we've had the police.

3 I mean, if this isn't sexually-
4 oriented, I don't know what is. And the
5 thing is, the Certificate of Occupancy that
6 was issued says, not sexually-oriented, and
7 this witness is talking about that. He's
8 trying to describe that, what is and what is
9 not sexually-oriented.

10 That gets down into permissibility,
11 and we in the -- Your Honor, I hate to say
12 it, but Mr. Katz is trying this (ph) just in
13 the wrong zone in the city, so that this zone
14 does not permit sexually-oriented businesses.
15 That's it.

16 Now, maybe some other zone does, but
17 that's not what we're talking about. We're
18 talking about 919 5th Street not being a
19 sexually-permissible zone area. That's it.
20 Very simple. Change the law or get a
21 variance; that's what his client has to do.

1 THE COURT: All right.

2 MR. KATZ: I just want case of
3 Renton, because that totally flies in the
4 face of what Mr. Green said.

5 THE COURT: All right.

6 MR. KATZ: If I may just briefly cite
7 the case. The City of Renton versus Play
8 Time Theaters, 475 U.S. 41, pages 51 through
9 53, which says, if your government want to
10 set aside zones that are especially set aside
11 adult businesses, you dot the i's and cross
12 the t's, and you're not going to even get
13 there if you have not shown you reasonably
14 relied on your own studies or -- or -- or
15 reliable studies from other jurisdictions
16 showing negative secondary effects from adult
17 entertainment.

18 I have gone upside, downside, inside
19 and out with the D.C. law, and I found
20 nothing showing reasonable reliance on
21 secondary effects. The closest I came was --

1 it was back in 1977, when most of the current
2 sexually-oriented business regulations came
3 through, and the best we have there is
4 there's a -- a conclusionary finding without
5 any mention of any studies or evidence as
6 saying, you know, the Zoning Board just finds
7 that -- that there's negative effects.
8 That's not enough under Renton.

9 As far as the zones that are
10 available for an adult -- a sexually-oriented
11 business to locate, there are only two. All
12 we have to do is look from page 1 to the last
13 page of Title XI of the DCMR. It's Section
14 744, et al., and Section 754, et al.

15 A very interesting happens when you
16 review them. You see that we get back to
17 FWPBS about how there's unbridled restraint
18 in the government to even have this law here
19 about where you can locate.

20 Some of the most disgusting ones are
21 744.6, the establishment shall be compatible

1 with other uses in the area; 744.7, the use
2 shall not become objectionable because of its
3 effect on the character of the neighborhood,
4 or because of noise, traffic or other
5 conditions; 744.8, the establishment shall
6 not have any adverse impact on religious,
7 educational and government facilities located
8 in the area. That language is duplicated in
9 744, et al. and 754 et al.

10 So what we have here is if a business
11 wants to even take the opportunity to apply
12 with the Board of Zoning Adjustment to get a
13 certificate to locate in these places, even
14 if they get the certificate to locate,
15 they're on pins and needles about whether
16 they can stay. Why? Because at all times,
17 they're under scrutiny about whether they're
18 always compatible with the neighborhood,
19 whether someone objects, whether a church or
20 school moves within 600 feet of them.

21 The Supreme Court's already disposed

1 of it --

2 THE COURT: All right. Mr. Katz, we
3 don't have to spend all evening on that.

4 I'm going to admit the document into
5 evidence. I will give it the appropriate
6 weight.

7 And we can move on. Mr. Green? You
8 may proceed, Mr. Green.

9 MR. GREEN: Yes, Your Honor.

10 BY MR. GREEN:

11 Q Briefly, sir -- (no audio) -- one
12 would go if one wanted to seek a variance to
13 a situation similar to what Mr. Katz has
14 alluded to in terms of his client? What
15 would he -- what would have to do? What's
16 the process?

17 A If the public (inaudible) it would
18 take a special exception on relief before the
19 Board of Zoning Adjustments.

20 I do believe the record will reflect
21 that J.M.M. had been -- been before the Board

1 of Zoning Adjustments and was denied.

2 MR. KATZ: Objection.

3 THE COURT: Mr. Katz?

4 THE WITNESS: (Inaudible.)

5 MR. KATZ: It's a surprise to me.
6 Judge, it's one of the problems. I made the
7 motion well in advance of when the -- the
8 first hearing started Tuesday. I want - I
9 want discovery; you don't give it to me. I
10 want witnesses; you don't give it to me. So
11 now I'm taken by surprise. You have all the
12 (inaudible) of a fair hearing if you're going
13 to let this in.

14 I looked all throughout the DCMR. I
15 looked through it on paper. I looked through
16 it on the computer. I looked through the
17 D.C. Code. Nowhere did I find any provisions
18 saying that I can't get discovery, that I
19 can't get subpoenas on NLI (ph).

20 All I found was the opposite, Your
21 Honor, which is that discovery is freely

1 allowed if these -- if these administrative
2 hearings of the DCRA -- that's all I found on
3 the Internet site.

4 This is news to me and, if you're
5 going to let it in, despite my objection, at
6 a minimum, let's find out what the basis is
7 for what he's saying, and let's get the
8 person's first (ph) knowledge, because I want
9 to cross-examine that person, because I
10 expect that this witness is wrong about what
11 he's saying.

12 THE COURT: With respect to wrong on
13 what? With respect to what?

14 MR. KATZ: I don't think he knows
15 whether my client went in front of the Board
16 of Zoning Adjustment. I'd like a little --
17 something more formal about there -- if you
18 make such a damage statement as that.

19 Another objection. This is a
20 witness. We have a rule on witness'
21 standing. This witness has been conferring

1 with Mr. Green on and on during this trial.
2 I move to strike all his testimony. I move
3 to dismiss him as a witness. That is not
4 fair and proper. I do not think that would
5 have been accepted of any other witness.
6 That is wrong. It violates the rule on
7 witnesses as well to have the -- the lawyer
8 who's examining that witness in discussion
9 with that witness during the trial.

10 That was happening right in front of
11 Your Honor. I brought it to your attention
12 earlier when I asked, should I be waiting for
13 this witness to finish talking before I
14 proceed with my objection.

15 THE COURT: All right. I -- I will
16 not strike the testimony that was given; and,
17 Mr. Katz, I will direct Mr. Green to
18 discontinue conferring with the witness if he
19 has done that more than once.

20 Proceed, Mr. Green.

21 MR. GREEN: Your Honor, for the

1 record, I got this witness out of a meeting.
2 This witness has been trying to explain to me
3 very candidly that he has to get back to his
4 meeting.

5 The reason we're delayed in using
6 this witness -- I think I explained to the
7 Court on the record -- that he was in a
8 meeting, that he's short-staffed, he's
9 dealing with outside people, that is, with
10 the citizens of the District of Columbia, who
11 are trying to get some kind of zoning
12 situation straightened out -- hopefully, it's
13 not sexually-oriented. And he's the only one
14 in the office.

15 I physically went down there, Your
16 Honor, and I found that to be the case. His
17 assistants, the people that normally work
18 with the public, weren't there. Now we've
19 got the public down there waiting, and we're
20 trying to be accommodative to the order of
21 the Court. That's why I personally went down

1 there to get the Zoning Administrator, and
2 he's here --

3 THE COURT: All right.

4 MR. GREEN: -- and he has to get out.

5 THE COURT: All right.

6 MR. GREEN: He has to leave. And I'm
7 trying to move this thing along, but every
8 time I try, I wind -- I wind up in a
9 roadblock here.

10 Now, this man is telling me he's got
11 to leave. That's why he's talking to me. He
12 says, I can't keep staying here.

13 THE COURT: All right.

14 THE GREEN: And I want the record to
15 under -- clearly reflect that.

16 MR. KATZ: I have no objection if the
17 witness wants to leave.

18 THE COURT: All right. Any other
19 questions, Mr. Green?

20 MR. GREEN: No, Your Honor.

21 THE COURT: All right. Mr. Katz?

CROSS-EXAMINATION BY COUNSEL FOR
THE RESPONDENT

BY MR. KATZ:

Q Mr. Bello, you're the Acting Zoning Administrator?

A That's correct.

Q All right. And the Acting Zoning Administrator has numerous tasks to do on a daily basis, right?

A That's correct.

Q And so, dealing with sexually-oriented business enterprises is not the only function you deal with on a daily basis; is that correct?

A That's correct.

Q Is it fair to say there's some days when you don't -- (no audio) -- have anything to do with the words, sexually-oriented business establishment; is that correct?

A The question is what?

Q Do you sometimes have a full workday

1 go by where you don't hear the word,
2 sexually-oriented, or don't say the word,
3 sexually-oriented?

4 A It may not (inaudible) necessarily.
5 But every Certificate of Occupancy
6 application that comes through the process
7 has to answer that question, yes or no, if
8 it's sexually-oriented.

9 Q Is that how you understood my last
10 question to be? Did you understand that my
11 last question was asking you about --

12 MR. GREEN: Your Honor, I'm going to
13 have to object because the question's been
14 asked and answered. He's badgering the
15 witness. He's not getting the answer that he
16 wants, so he's just going to just beat up on
17 the witness. We can't have that.

18 THE COURT: Mr. Katz, just rephrase
19 your question.

20 BY MR. KATZ:

21 Q I suppose that if you come in here

1 with so much authority that you know what the
2 DCMR reference is to the definition of
3 sexually-oriented business establishment?

4 A Section 199.1.

5 Q And I suppose you know so much that
6 you also know what the reference is to the --
7 to the provision of the SDCMR (ph) that deals
8 with sexually-oriented businesses for Zoning
9 Division C-3?

10 A This is a section not off my head
11 (ph), but I do know that it requires special
12 exception (inaudible).

13 Q And then I suppose you also don't
14 know what the --

15 MR. GREEN: Your Honor, I'm going to
16 -- Your Honor, I'm going to object.

17 THE COURT: All right.,

18 MR. GREEN: We've got here an attempt
19 to try and see if the Acting Zoning
20 Administrator is competent to -- to do his
21 job. We've got an attempt here to -- to --

1 to -- to quiz him, if you will, on matters
2 that are beyond the scope of what the direct
3 examination dealt with.

4 Now, you know, if he -- if he has a
5 problem, then I think he ought to state what
6 his problem is, rather than just going
7 through this high school exercise.

8 THE COURT: Mr. Katz, just stay with
9 the direct, please.

10 MR. KATZ: This is cross-examination,
11 Your Honor. During direct examination --

12 THE COURT: But you can only cross-
13 examine him what he testified to on direct.

14 MR. KATZ: And this goes directly to
15 what he was going to on direct, because on
16 direct, he claimed to have knowledge about
17 what needs to be done to get -- to get
18 permission to locate as a sexually-oriented
19 business. And I am now covering with him --
20 I am impeaching him about the limits to his
21 knowledge about that.

1 His knowledge must be very limited if
2 he does not -- there are just two main
3 sections he needs to know the numbers of to
4 know exactly where you go to for the
5 standards. He doesn't know them; therefore,
6 his reliability is not there.

7 This is -- this is perfectly
8 available on cross-examination. To not allow
9 me to do that cross-examination is wrong,
10 improper and unfair; and it means that if I'm
11 not allowed to do my cross, then the direct
12 testimony should not come in.

13 MR. GREEN: Your Honor, I think the
14 Court is old enough to have gone through law
15 school, and to have been experienced enough
16 to understand that, a lot of times, people do
17 not cite chapter and verse the law, but they
18 know where to find the law; they know how to
19 understand it once they read it.

20 Now, I'm not saying that our Zoning
21 Administrator can cite the law as it relates

1 to sexually- and non-sexually-oriented areas
2 chapter and verse. I know I sure can't do
3 it. But I do believe he knows how to read
4 the English language pretty well, and he
5 knows where to find the law.

6 Now, if we're going to get into a
7 discussion that relates to the inability or
8 the ability of one to cite the law chapter
9 and verse, then I think we're going to have a
10 serious problem here, because no lawyer worth
11 his salt is going to be able to walk around
12 and cite the law. As Your Honor knows, the
13 law is an ever-changing, ever-living thing;
14 and if it's going to change, and if it's
15 going to be living, it's certainly going to
16 change, it's going to be modified.

17 So you can't carry the -- you can't
18 carry the chapter and verse in your head --

19 MR. KATZ: Unfortunately, Your Honor

20 --

21 MR. GREEN: -- but you have to know

1 how to find the law, Your Honor.

2 THE COURT: All right.

3 MR. KATZ: Unfortunately, Your Honor

4 --

5 THE COURT: Go on, Mr. Green.

6 MR. KATZ: -- there's only five or
7 six key provisions for what covers the sense
8 -- the sexually-oriented business, including
9 getting into the zones. There's only two
10 zones. This witness claims on direct that he
11 knows all the stuff that he claims to know.
12 I am planning on impeaching him, to break him
13 down. He doesn't know as much as he tells
14 you he knows.

15 That is a proper area for cross-
16 examination because, otherwise, you know, the
17 law can't permit somebody to give direct
18 unless their opponent is available -- is able
19 to get to the truth. And the truth that I'm
20 getting to is that he doesn't know as much as
21 he tells you he does on direct.

1 THE COURT: Proceed with your
2 question, Mr. Katz.

3 MR. KATZ: Thank you.

4 MR. GREEN: Excuse me, Your Honor,
5 does this mean that my -- (no audio) --
6 objection has been overruled?

7 THE COURT: Right.

8 MR. GREEN: All right.

9 THE COURT: (Inaudible) overruled.
10 Proceed, Mr. Katz.

11 BY MR. KATZ:

12 Q Are -- are you aware whether an C-M
13 Zone serve -- do you want me to wait for you?

14 A Go ahead.

15 Q Are you aware whether a C-M Zone is
16 available for a sexually-oriented business
17 establishment to locate in if the Board of
18 Zoning Adjustment approves that?

19 A Well --

20 MR. GREEN: I'm going to object, Your
21 Honor. First of all, I think that for the

1 purpose of the record, he ought to ask,
2 number one, what the definition of a C-M Zone
3 is so that he can then move forward. I don't
4 think we've had a -- a good foundation here.

5 MR. KATZ: I have no problem with
6 that asked on direct. I'm asking my cross-
7 examination questions, Your Honor.

8 THE COURT: Your question to him is
9 whether or not if a variance is granted by
10 the BZA, then what?

11 MR. KATZ: Oh, I don't mind putting
12 it that way. The variance --

13 THE COURT: Well, what -- what are
14 you ask -- I mean, I'm trying to understand
15 your question.

16 MR. KATZ: There are only two zones
17 that are available under the DCMR --

18 THE COURT: No, don't testify. Just
19 tell me -- just repeat the question.

20 BY MR. KATZ:

21 Q Do you know whether a C-M is

1 available for a sexually-oriented business
2 establishment to locate in if the Board of
3 Zoning Adjustment allows it? Do you know if
4 the DCMR allows it?

5 A There actually -- to answer your
6 question a little better, there is no zone
7 district in the District in which it would
8 establish a sexually-oriented establishment
9 without going through a special exception
10 relief. That covers all zones.

11 Q It is your opinion that the Board of
12 Zoning Adjustment has the authority to let a
13 sexually-oriented business establishment
14 locate anywhere in the District of Columbia
15 if the Board of Zoning Adjustment says so?

16 A It is certainly the Office of the
17 Board of Zoning Adjustment to grant any kind
18 of relief (inaudible).

19 The critical difference is that some
20 zones require the D.C. special exception
21 relief (ph), and some would require variance.

1 Q Are you not familiar, sir, the DCMR
2 has some provisions in it, in Title XI, the
3 zone provisions, that say you absolutely
4 cannot, must not, cannot locate a sexually-
5 oriented business establishment in this
6 particular zoning division?

7 MR. GREEN: I'm going to object, Your
8 Honor. Again, I object, Your Honor.

9 THE COURT: What -- I'm not following
10 your questions, Mr. Katz. I'm having trouble
11 with them.

12 What -- what is it -- what is it
13 you're trying to solicit?

14 MR. KATZ: This witness is not
15 reliable. He is not as reliable knowledge-
16 wise, and ability-wise to --

17 THE COURT: And that is based on --

18 MR. KATZ: -- explain it to you, as
19 far as the issues that deal with this case.

20 THE COURT: And that is based on
21 what?

1 MR. KATZ: Let's put him out of the
2 room, because I'm not going to coach him with
3 -- with my answers here. If it was a big
4 courtroom, I'd be approaching the Bench right
5 now. I'm not going to coach the -- my -- my
6 opposing witness right now. I'll answer that
7 question when he's out of my earshot.

8 MR. GREEN: Your Honor, I would
9 submit that Mr. Katz is certainly not on the
10 witness stand and not giving testimony; Mr.
11 Bello is.

12 Now, you know, if he wants to ask him
13 a question, he should. If he wants to give
14 testimony, then maybe he should be sworn in
15 and just be a witness.

16 MR. KATZ: I've been asking questions
17 the whole time, Your Honor, except for the
18 times when you've been asking me to explain
19 anything. I'm just trying to get to the
20 truth here; and I think the truth is that
21 this witness has very limited ability to

1 enlighten us on anything that goes directly
2 to making a decision on this case here. And
3 if I'm permitted to do that, I will go ahead.

4 MR. GREEN: Your Honor, Mr. Katz is
5 dissatisfied with the answers that the
6 witness has given. Mr. Katz is dissatisfied
7 that this Court cannot give the kind of
8 relief that he wants as it relates to the
9 Constitution of the United States in general;
10 more specifically, the First Amendment.
11 That's what this is all about, and that's not
12 what this case is about.

13 MR. KATZ: May I, Your Honor?

14 We were here on the 5th of March. I
15 got either one or no sustained on objections
16 I made. We're really going to have a major
17 problem about any (inaudible) of this being
18 fair if I'm not allowed to proceed with my
19 questions.

20 MR. GREEN: Your Honor, his questions
21 are designed to elicit information related to

1 direct examination. His questions are not
2 designed to impeach --
3 impeach the witness based on what he has
4 said.

5 His questions are basically -- let me
6 find in the book, on paragraph 1 and
7 paragraph 2, "Do you recall what..." (tape
8 inaudible).

9 Then I would remind the Court that
10 this witness has to get out of here. He had
11 to leave. We've been here an hour with this
12 now, thereabouts.

13 MR. KATZ: If you want to strike his
14 testimony, I have no further cross-
15 examination questions. But if his testimony
16 is not going to be stricken I have the right
17 --

18 THE COURT: I want you -- I want you
19 to keep your cross-examination with the
20 direct testimony in mind.

21 MR. KATZ: Your Honor, that's what

1 I'm doing. When you say, sustained, I will
2 go to the next question.

3 THE COURT: I think -- I think you're
4 --

5 MR. KATZ: But I think we're having
6 an unfair hearing, is what we're having.

7 MR. COURT: You're going -- I mean,
8 you've said that from day 1, Mr. Katz because
9 I would not entertain your First Amendment
10 argument. I will not.

11 Continue with your cross-examination,
12 but please stay within the testimony that was
13 given.

14 MR. KATZ: You and I have a
15 disagreement what that is, Your Honor, but
16 when you say, sustained, obviously, I will go
17 to the next question. So that's what I will
18 do, and that's what I've been doing all
19 along. Every time you've said, sustained, I
20 have -- I have left that be, and gone on to
21 the next questions.

1 THE COURT: I will overrule your
2 objection.

3 Go ahead with your next question.

4 MR. KATZ: Thank you.

5 BY MR. KATZ:

6 Q Do you remember what my last question
7 was?

8 A No; repeat it.

9 THE COURT: Why don't you repeat it,
10 sir.

11 BY MR. KATZ:

12 Q Are you telling us today that there
13 are no provisions of the DCMR that say that
14 there are one or more zoning districts where
15 the sexual-oriented cannot locate, period?

16 A I don't -- what I'm -- what I'm
17 telling you is that you cannot establish a
18 sexually-oriented establishment in this city
19 without seeking relief from the Board of
20 Zoning Adjustment in any zone.

21 Q If Mr. Green wants to ask you that

1 question, that's fine, but that wasn't my
2 question.

3 Do you remember what my question was?

4 MR. GREEN: I'm going to object, and
5 my objection goes to asked and answered.
6 This man has answered his questions. He's --
7 counsel has asked his questions three or four
8 different ways. The witness has answered his
9 question.

10 Can we move on?

11 THE COURT: All right. I'm going to
12 sustain the objection. Let's move on, Mr.
13 Katz.

14 BY MR. KATZ:

15 Q Do you consider yourself the chief
16 enforcement person for zoning in the District
17 of Columbia?

18 A I'm the most senior one currently.

19 Q For enforcement of the zoning laws?

20 A Enforcement and administering.

21 Q Then you would certain know, sir,

1 would you not, whether there is even one
2 business in the District of Columbia which
3 has a Certificate of Occupancy that says,
4 sex-oriented business establishment?

5 A Would I know whether there's
6 Certificate of Occupancy (inaudible), no,
7 because the -- the question on a Certificate
8 of Occupancy is, and the amendment that
9 created the sexual-oriented establishment
10 definition is not as old as the (inaudible)
11 zoning regulations, so you would have some
12 establishments that probably were in
13 operation prior to that amendment.

14 Q Are you saying that you know for a
15 fact that there are more than one -- one or
16 more businesses that have a sexual-oriented
17 business establishment Certificate of
18 Occupancy in the District of Columbia?

19 A No; that's not what I said.

20 Q So you're saying you just don't know?

21 A I'm saying that you wouldn't find --

1 that you could find an establishment that's
2 operating among those standards, but those
3 establishments will precede the amendment
4 that created the definition for sexual-
5 oriented establishment in the zoning
6 regulations.

7 Q I understand your answer. I just
8 want you to tell us, do you know if there's
9 even one business in the District of Columbia
10 that has a Certificate of Occupancy that says
11 sexual-oriented business establishment?

12 A There's none that I know of.

13 Q Have you ever been to law school?

14 A No, sir; I never claimed to be a
15 lawyer.

16 Q Have you ever read the Supreme Court
17 case of FWPBS versus Salis (ph)?

18 A No, sir.

19 MR. GREEN: Your Honor -- Your Honor,
20 I object. I object.

21 THE COURT: Objection --

1 MR. GREEN: Where are we going with
2 this?

3 THE COURT: Objection sustained.

4 Let's -- let's -- let's go, Mr. Katz.
5 Any other questions for Mr. (inaudible)?

6 BY MR. KATZ:

7 Q Do you consider yourself bound by the
8 Gladys Hicks' opinion that was put into
9 evidence today?

10 A Absolutely, I am, because it's an
11 extension of the zoning regulations as we
12 apply them today.

13 Q So you don't have any plans to make
14 any amendments to that opinion from Ms.
15 Hicks.

16 A Not at all.

17 Q So you agree with every single page
18 in her opinion?

19 A That's correct.

20 Q Do you feel that your successor as
21 Zoning Administrator is going to be bound by

1 Ms. Hicks' opinion?

2 MR. GREEN: Objection, Your Honor.
3 That's speculative. We don't even know who
4 the successor's going to be. It might be Mr.
5 Katz.

6 MR. KATZ: I hardly think so.

7 MR. GREEN: We don't know.

8 MR. KATZ: But we know who it won't
9 be; it won't be me. It will be neither
10 offered nor accepted.

11 MR. GREEN: I don't want it either,
12 but definitely (inaudible).

13 THE COURT: (Inaudible) of questions.

14 MR. KATZ: Well, I'm waiting for a
15 ruling on my last question, sir.

16 THE COURT: Let me answer it.

17 I'm --

18 MR. GREEN: It's speculative. It's
19 speculative, Your Honor, and he can't answer
20 it.

21 THE COURT: But -- but he did answer.

1 He said, he didn't know. He couldn't speak
2 for someone else. That was an answer.

3 MR. GREEN: All right.

4 BY MR. KATZ:

5 Q You're certainly not aware of
6 anything in the law that requires the Zoning
7 Administrator to accept the written opinion
8 of their predecessor, are you?

9 A Other -- not (inaudible) remarks.
10 But the only (inaudible) upon which wouldn't
11 is if it's grossly inconsistent with the
12 regulations.

13 Q You're going to be following Ms.
14 Hicks' opinion; is that correct?

15 A I surely must.

16 Q Throughout the entire time that you
17 are the Zoning Administrator?

18 A That is correct.

19 Q So if Mr. Montiel's business ends up
20 satisfying your office that is following that
21 opinion, then you have no further reason to

1 enforce against him; is that correct?

2 A That's correct.

3 Q Okay. But you certainly don't find
4 anything in the law that requires you to
5 follow Ms. Hicks' opinion; is that correct?

6 A There's nothing in the law, other
7 than practice.

8 Q Well, I mean, aren't you aware that
9 you're predecessor, Mr. Johnson, said that he
10 wasn't bound by Ms. Hicks' written opinion?

11 A I'm not aware of that.

12 Q If you ever change your mind about
13 whether you agree 100 percent with Ms. Hicks'
14 opinion, are you going to write your own
15 opinion on that?

16 A I will never change my mind about
17 agreeing with that opinion.

18 Q But aren't you aware that in her
19 opinion, there are provisions to talk about
20 other jurisdictions that count the definition
21 of adult as being above 15 percent? Aren't

1 you aware of that?

2 A That's other jurisdictions. That
3 wasn't this jurisdiction. My mandate is
4 limited to this jurisdiction.

5 MR. KATZ: No further questions.

6 THE COURT: Anything under direct,
7 Mr. Green?

8 MR. GREEN: Just briefly.

9 REDIRECT EXAMINATION BY COUNSEL FOR
10 THE GOVERNMENT

11 BY MR. GREEN:

12 Q Counsel asked if Mr. Montiel --

13 MR. KATZ: Montiel.

14 MR. GREEN: Montiel; I'm sorry.

15 MR. KATZ: Three syllables.

16 MR. GREEN: He -- he can tell me how
17 many.

18 BY MR. GREEN:

19 Q -- meets the criteria as established
20 by this agency, he would be allowed to
21 continue; is that right?

1 A That's correct; in compliance.

2 Q In other words, you have to become
3 Block Busters; is that not right?

4 MR. KATZ: Oh, objection. Come on.
5 The opinion's the opinion.

6 MR. GREEN: I don't have any other
7 questions, Your Honor.

8 THE COURT: No questions, Mr. Bello
9 (ph).

10 MR. GREEN: All right, sir, thank
11 you.

12 THE COURT: The following witness is
13 here? I'll ask someone to go out and get
14 him. Mr. Bellow, when you go out, would you
15 ask Mr. -- what's his name?

16 MR. KATZ: Adjie O'Bryant.

17 THE COURT: Mr. O'Bryant to come on
18 in, please?

19 MR. KATZ: All I need to do with him,
20 if you'll let me, I just need one minute with
21 him for me to be silent and just find out

1 what he's planning to testify about, because
2 I've never been able to talk to him
3 substantively about --

4 MR. GREEN: No, no, no, no, no, no,
5 no.

6 MR. KATZ: I was told nothing about
7 what was testified to.

8 THE COURT: No. We need to move on.
9 We need to move on, Mr. Katz.

10 MR. KATZ: It's not going to take
11 very long.

12 THE COURT: Mr. Katz, I continued
13 this hearing because he was only available at
14 1 o'clock today. He is here.

15 MR. KATZ: He's in a death penalty
16 trial, and there was -- number one, there was
17 a rule on witnesses. There was no way that I
18 was going to talk to him about his
19 substantive testimony before getting Your
20 Honor's permission, and I didn't know of any
21 way to get in touch with Your Honor, other

1 than -- other than what -- what should we
2 call it when you --

3 THE COURT: (Inaudible).

4 MR. KATZ: Ex parte?

5 THE COURT: Yes.

6 MR. KATZ: I wasn't going to talk to
7 Your Honor ex parte, and you were going to
8 expect that, to ask permission. So because
9 now I have Your Honor here, all I'm asking
10 for is one minute to have him tell me what
11 he's planning on saying, and for me not to
12 tell him anything, that I'm following the
13 rule on witnesses, so that the (inaudible) --
14 the wrong witnesses -- the witnesses don't
15 know what was said. I just want to hear it
16 from him. (Inaudible) the same courtesy, and
17 I appreciate that with our investigator. All
18 I'm asking for with this witness is
19 (inaudible)s.

20 If I knew that I had permission to
21 hear from him before today, I would have done

1 it. But I -- I will never violate the rule
2 on witnesses.

3 THE COURT: But you subpoenaed him.
4 This is your witness.

5 MR. KATZ: I understand that, but I
6 wasn't able to have him returning my phone
7 calls after the subpoena until this week when
8 the rule on witnesses was already in place.

9 So I just ask for one minute, not
10 more than that, 60 seconds. He's a very
11 bright man. He gets it all out very well in
12 60 seconds.

13 MR. GREEN: Can I be heard, Your
14 Honor, please?

15 THE COURT: Go ahead.

16 MR. GREEN: You know, under normal
17 circumstances, I probably wouldn't even say
18 anything, but this -- this is the third
19 continuance on this case, and I didn't ask
20 this witness to be here specifically; Mr.
21 Katz did. And this distinguished member of

1 the Bar was one of two people that
2 represented the respondent.

3 Now, from September or November, or
4 whenever it was, up until now, they have
5 (inaudible) have been quite a bit of time,
6 particularly with since we've had so many
7 filings in this case by the respondent, to
8 have sit down with or talked on the telephone
9 with the witness.

10 And now we want one minute and delay
11 thing further just -- I find that just
12 absolutely incredulous and amazing, Your
13 Honor.

14 And on that basis alone, I would
15 object.

16 MR. KATZ: Come on, Your Honor, the
17 Court -- the Court gave more than the 10
18 minutes allotted for Mr. Bello to come up
19 here. The Court wouldn't guarantee me that I
20 could have more time beyond last Tuesday to
21 have Mr. O'Bryant here until the Court found

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1 out Mr. Bello was here.

2 We've taken more time on this
3 discussion for Mr. Bellow to be here.

4 THE COURT: What did you just say?
5 What did you just say; the Court didn't do
6 what?

7 MR. KATZ: I'm --

8 THE COURT: Let's proceed.

9 MR. KATZ: I'm asking questions
10 (inaudible). I asked for a minute of your
11 time --

12 THE COURT: The motion -- the motion
13 is denied. Let's proceed.

14 Mr. O'Bryant, would you please take
15 that chair, please, sir?

16 THE COURT: Let the record reflect we
17 are now joined by two individuals. Would you
18 please state your names for the record?

19 MR. O'BRYANT: My name is Adjie
20 O'Bryant, Jr. That's A-d-j-i-e, last name O-
21 '-B-r-y-a-n-t, Jr.

1 THE COURT: And the lady?

2 MR. O'BRYANT: With me is an office
3 assistant, Ms. Hilliard.

4 THE COURT: Very well. Can I get you
5 to raise your right hand, Mr. O'Bryant?

6 MR. O'BRYANT: Yes, sir.

7 (Witness sworn.)

8 THE COURT: Very well. Mr. Katz.

9 DIRECT EXAMINATION BY COUNSEL FOR THE
10 RESPONDENT

11 BY MR. KATZ:

12 Q Good afternoon, Mr. O'Bryant.

13 A Good afternoon, Mr. Katz.

14 Q Thanks for coming down. I assume
15 you're in the middle of a death penalty
16 trial?

17 A Yes.

18 Q Mr. O'Bryant, are you predecessor
19 counsel along with James Wright (ph) of Jose
20 Montiel, or at least his company J.M.M.?

21 A That's correct.

1 Q And did you represent his company,
2 Mr. Wright, about almost two years ago, I
3 guess, appearing in front of Judge Simon?

4 A That's correct.

5 Q Now, after that hearing was held, did
6 Mr. Montiel's business open back up right away?

7 A Not right away, but there was a
8 hiatus of time. I don't recall exactly the
9 number of months, but there was --

10 THE COURT: We're not hearing you
11 that well. Move the microphone up.

12 THE WITNESS: The business did not
13 reopen immediately after the hearing. It was
14 several months after the hearing that the
15 business actually reopened.

16 BY MR. KATZ:

17 Q Did you give Mr. Montiel or his
18 business, J.M.M., any assistance in trying to
19 reopen?

20 A Yes, I did.

21 Q Was one of the ways you gave

1 assistance having any discussions with
2 anybody at the DCRA or, more specifically,
3 the Zoning Division?

4 A That's correct. I did have numerous
5 conversations, and at least three meetings,
6 with persons in Zoning.

7 Q And who are those people who you had
8 the discussions with?

9 A Primarily the Zoning Commissioner,
10 and I don't recall his name at the moment.

11 Q Was that Mr. Johnson?

12 A I believe so.

13 Q Was it the Zoning Commissioner who --
14 who was in office at the time that the J.M.M.
15 Corporation's last hearing was when you were
16 there?

17 A I could best identify him as the
18 Zoning Commissioner that testified for the
19 D.C. Government in Mr. Montiel's hearing.

20 Q And that was the hearing that was on
21 May 23rd of 2000?

1 A I'm not exactly certain of the date,
2 but my best recollection is it was around
3 that time, and Judge Lennox was the presiding
4 Administrative Law Judge.

5 Q Okay.

6 A And Mr. -- the esteemed Mr. Matthew
7 Green was counsel for the D.C. Government.

8 Q Who else do you speak with in the
9 government to try to get (inaudible).

10 A I know we spoke to persons in Zoning,
11 but my present recollection now primarily was
12 -- I guess the most fruitful conversations
13 was with the Zoning Commissioner.

14 Q When you had discussions with the
15 Zoning Commissioner, was there always someone
16 present, or was -- or was it sometimes just
17 you and him alone?

18 A Mr. Wright accompanied me on the --
19 at least once, Mr. Montiel was present, and
20 there was other persons in the room from the
21 D.C. Government, but I can't recall who they

1 were.

2 Q Were they present when Mr. Green was
3 present?

4 A I can't -- I don't really recall
5 whether or not Mr. Green was present,
6 although he and I may have had conversations;
7 but I really don't remember Mr. Green being
8 present. He may have been, but my present
9 recollection now isn't refreshed by Mr. Green
10 being present.

11 Q Okay. Did you ever have any
12 discussions with Gladys Hicks from starting -
13 - getting J.M.M.'s Corporation to open up
14 again?

15 A He has re-retained Ms. Hicks as an
16 expert witness to assist us in Mr. Montiel's
17 matter.

18 Q Was Ms. Hicks with the government? I
19 guess Ms. Hicks was not with the government
20 at that time in a (inaudible).

21 A She was not an employee of the D.C.

1 Government.

2 Q And what type of assistant did you
3 get from Ms. Hicks?

4 A Ms. Hicks was the prior Zoning
5 Commissioner, and she had issued some type of
6 ruling, and that matter had come up in the
7 hearing.

8 Q Right.

9 A And based upon her administrative
10 order or ruling, she had indicated some type
11 of policy on the division of pornographic
12 material and non-pornographic material and a
13 percentage basis. And based upon that, it
14 was our understanding that Mr. Montiel should
15 have come under that particular ruling or
16 policy. And the hearing resulted unfavorably
17 in terms of our assisting Mr. Montiel, and we
18 were attempting to get him into compliance
19 with that policy.

20 There was a dispute as to whether or
21 not the policy --

1 MR. GREEN: Hold on a minute. Open
2 the door, please.

3 THE COURT: Go ahead, sir.

4 THE WITNESS: There was a dispute as
5 to whether or not the -- Mr. Johnson or the
6 present Zoning Commissioner had to honor the
7 Hicks policy. And his position was -- that
8 is, the Zoning Commissioner's position was --
9 that he did not have to honor the Hicks
10 policy, that he had a zero-tolerance policy.

11 Our position was that the Hicks
12 policy was in effect, Mr. Montiel should have
13 been grandfathered in under the Hicks policy,
14 and we argued that new rules were
15 promulgated, and Mr. Montiel was never given
16 any type of notice that the Hicks policy was
17 not in effect. So that's basically how Ms. -
18 - Mrs. Hicks came into the picture.

19 So those were primarily the
20 discussions.

21 BY MR. KATZ:

1 Q What was the advice to you and/or Mr.
2 Wright by Ms. Hicks?

3 A Ms. Hicks assisted us in getting Mr.
4 Montiel into compliance under her policy.

5 However, as I've indicated, the
6 Zoning Commissioner's position was that the
7 Hicks policy was not binding on this, and so
8 -- (no audio).

9 So to answer your question, Mrs.
10 Hicks assisted us in getting Mr. Montiel
11 under her policy. And since she wrote that
12 particular decision, we asked her to assist
13 her in implementing the decision, and that's
14 what we did.

15 Q What type of assistance did Ms. Hicks
16 give in terms of advice concerning how the
17 floor space be set up, and what should be
18 done about booths, and what did she speak on
19 about the inventory, and all the other
20 aspects of operation of J.M.M. Corporation?

21 A We retained Ms. Hicks. We had

1 numerous conversations with her, meetings
2 with her. And on three occasions, we went to
3 Mr. Montiel's business on 5th Street, and she
4 measured the business floor space, counted
5 the inventory, and she devised and
6 implemented what she thought would be in
7 compliance with her policy, and that's what
8 we directed Mr. Montiel to do.

9 Q Could you give us some more specifics
10 about what Mr. Hicks' advice was concerning
11 the floor space and where to set up the adult
12 video section?

13 A I don't really have a present
14 recollection to be specific, but all that I
15 can tell you is that she made three trips to
16 his business, and I know that she rearranged
17 his inventory; certain pornographic material
18 was taken from the front and was placed in
19 the rear, so that it could not be seen. And
20 she literally counted the number of videos,
21 magazines, or what have you, and she decided

1 what would be in compliance with her policy.
2 And this was a very detailed process; it took
3 a number of hours to do.

4 But eventually, he was directed and
5 advised what to do, and to be in compliance
6 with her policy.

7 Q And what were the discussions with
8 Ms. Hicks about booths?

9 A Mrs. Hicks -- basically, a number of
10 booths were removed --

11 Q Uh-huh (affirmative).

12 A -- and so that he would be in
13 compliance with her policy.

14 However, there was an ongoing,
15 concurrently, a legal discussion with the
16 Zoning Commission, and I would suspect with
17 Mr. Matthew Green, as to whether or not the
18 booths were prohibited. And that was sort of
19 an ongoing discussion.

20 But she told him how many booths to
21 remove --

1 Q Right.

2 A -- and we made certain that whatever
3 number she suggested --

4 Q Right.

5 A -- I think we went two under that
6 number to make sure that he was in
7 compliance.

8 But the legal issue of whether or not
9 the booths were prohibited by law was a legal
10 issue. But in terms of compliance with
11 inventory and pornographic versus non-
12 pornographic material, she decided what would
13 be in compliance, as his inventory was in his
14 store.

15 Q Do you remember how many booths Ms.
16 Hicks advised would make sense?

17 A I -- I really don't recall the
18 number, but I do know that Mr. Montiel had --
19 I wouldn't want to venture, because I would
20 be guessing or speculating. But she reduced
21 the number of booths.

1 And Mr. Montiel, of course, was
2 somewhat upset because he wanted a larger
3 number of booths, because that basically was
4 the major income-generator in his business.
5 But in order to be in compliance and to stay
6 in business, he agree do to follow her
7 directive.

8 So whatever the number was --

9 Q Right.

10 A -- that she reduced, he agreed to
11 take them out, and plus an additional two to
12 make sure --

13 Q Well --

14 A -- he was in compliance.

15 Q -- do you know at least a minimum
16 number that -- that she talked about it? I
17 mean, was it a number bigger than two or a
18 number bigger than four booths that she spoke
19 of?

20 A I really (no audio) would be
21 guessing.

1 Q Right.

2 A But if you want me to guess, I would
3 say that I think the booths were reduced to
4 either 9 or 12 booths. He may have had
5 something like 18 or 21; I'm not -- I'm not sure

6 But I don't have my file, and I've
7 given you a copy of my file. Maybe there's
8 something there that could refresh my
9 recollection.

10 MR. KATZ: May I?

11 THE COURT: Get them.

12 THE WITNESS: But I know Mr. Green
13 knew the number of booths to have concessions
14 on how many should be reduced.

15 MR. KATZ: I don't think I found it
16 in here, but about everything on this side,
17 on the left, is what I got in here.

18 THE WITNESS: May I have your
19 indulgence, Your Honor?

20 MR. COURT: Yeah. How long is it
21 going to take now to go through that file,

1 Mr. Katz?

2 MR. KATZ: I directed him -- I
3 believe that everything he gave me is on the
4 left side, so that's not more than about 20
5 sheets. But I would be happy for Mr.
6 O'Bryant to (inaudible).

7 THE COURT: Go ahead, Mr. O'Bryant.

8 THE WITNESS: I know that Mr. Matthew
9 Green, at the time that the hearing was
10 ongoing, knew the number of booths, so I'm
11 not sure if he has that file. But I do know
12 that he knew the number of booths, because
13 that was part of the -- the hearing.

14 KATZ: And you know as -- I don't
15 think it's in the file, unless I -- I must
16 have missed it.

17 THE WITNESS: I do recall there were
18 buddy booths or something, were two adjoining
19 booths, and...

20 If you'll indulge me, Your Honor,
21 I'll look through this quickly.

1 (Inaudible conversation.)

2 MR. KATZ: I know. And also, there
3 was a part of it that I guess -- that I would
4 specifically (inaudible) a certificate for
5 his booths. I don't know if we got
6 (inaudible) go looking for them.

7 Mr. Green has given Respondent his
8 copy. I think that's about the best or
9 closest you're going to find, unless I was
10 just applying (ph) to something (inaudible).

11 THE WITNESS: Mr. Katz' file does not
12 assist me...

13 (End of 8, side A.)

14 (Start of tape 8, side B.)

15 THE WITNESS: ... refreshing my
16 recollection.

17 MR. KATZ: Okay. Mr. Green --

18 THE WITNESS: Is that directed to me
19 or Mr. Green?

20 MR. KATZ: Sorry.

21 MR. GREEN: We all (inaudible).

1 MR. KATZ: I did not mean any
2 disrespect. I've been under major sleep
3 depuration lately.

4 BY MR. KATZ:

5 Q Mr. O'Bryant, do you remember
6 anything else that Ms. Hicks had advised
7 concerning changes in the J.M.M.
8 Corporation's store that you have not already
9 told us about?

10 A Mrs. Hicks, as I indicated, sexually-
11 oriented material was moved from one portion
12 of the store to another portion of the store,
13 that being a -- a major wall that divided the
14 front and back of the store.

15 She also directed him to reduce the
16 number of booths.

17 Q Right.

18 A We also had the -- each of these
19 mechanically-operated booths --

20 Q Right.

21 A -- they were coin operated.

1 Q Right.

2 A That was changed from a coin
3 operation to another system, whereby
4 individuals would come in and they would pay,
5 and it would be mechanically operated, as
6 opposed to coin operated. So that was (no
7 audio) changed.

8 And that's -- that's basically all
9 that I can -- can recall without any other
10 detail.

11 Q Now, when you mentioned negotiations,
12 were these negotiations where you were always
13 present, or was it sometimes Mr. Wright there
14 by himself?

15 A As best that I can recall, I was
16 present at each meeting that we had with the
17 Zoning Commissioner.

18 Q And what was discussed, and what
19 agreement was made for these negotiations?

20 A Well, I'm not exactly certain that an
21 agreement was made, but the -- the

1 discussions revolved around certain legal
2 issues. Some constitutional issues were
3 raised about sexually-oriented material.

4 Secondly, notice provisions to Mr.
5 Montiel got -- were absent that we feel --
6 felt that Mr. Montiel was not put on notice
7 that there was going to be a zero tolerance.

8 Q Right.

9 A Discussions in terms of these
10 mechanical coin-operated booths, that was
11 discussed, whether they were prohibited or
12 not prohibited, whether or not they should
13 have been grandfathered in --

14 Q Okay.

15 A -- that was discussed at length.

16 And the Hicks opinions, decisions,
17 that was discussed.

18 And as I've indicated, based on
19 advice of counsel of Mr. Green, the Zoning
20 Commissioner's position was that any
21 (inaudible) was not binding on him --

1 Q Right.

2 A -- from Mrs. Hicks --

3 Q Right.

4 A -- that he could implement his own
5 policy.

6 Now, there was discussion on whether
7 or not that policy had been promulgated
8 properly.

9 Q Yes.

10 A But the bottom line was that his
11 decision was he had a zero tolerance, that
12 Mr. Montiel did not fall within that zero
13 tolerance.

14 Q Right.

15 A Our position was that Mr. Montiel
16 should have been grandfathered in --

17 Q Uh-huh (affirmative).

18 A -- and that he would follow under the
19 Hicks decision, or her policy.

20 Q Right.

21 A And so we directed Mr. Montiel to

1 follow the Hicks policy.

2 Q Right.

3 A And should he have any legal issue,
4 then that would have been raised at that
5 particular time. Then the moment would have
6 been -- the case would have been right at
7 that time, he would have had standing --

8 Q Right.

9 A -- we thought, to proceed to any type
10 of legal recourse.

11 Q Did you have any understanding about
12 whether -- whether there was at least some
13 advance notice to J.M.M. or its attorneys
14 before any further enforcement action would
15 take place and put in issue (inaudible) for
16 action?

17 A I -- I can't state with any present
18 recollection that that was the case. That's
19 my best recollection of what was discussed.

20 Q Did you have the opportunity to get
21 hold of some of the Certificates of Occupancy

1 for other OVS (ph) stores in D.C. that, you
2 know, included sexual-oriented materials in
3 their inventory?

4 A Yes.

5 Q Did -- were you personally involved
6 in doing that?

7 A We had someone that investigated the
8 case for us, and they were able to get
9 copies, or at least photographic copies, of
10 Occupancy Permits. And we felt that there
11 was an issue of discriminatory enforcement of
12 the regulations adversely against Mr.
13 Montiel. It seems as if no other business in
14 the city had to go through the problems that
15 Mr. Montiel was going through.

16 Q And how did you make that conclusion?

17 A Based on our assessment, and just
18 speaking to different businesses in the city.

19 Q So, did you make some of these visits
20 yourselves -- yourself, or was that always
21 through the investigator?

1 A That was through some other persons.
2 And Mr. Wright, I think, more or less
3 conducted that part of the -- of the case.

4 MR. KATZ: Okay. Thank you very
5 much.

6 THE WITNESS: Okay.

7 MR. KATZ: We'll see if Mr. Green has
8 any questions.

9 CROSS-EXAMINATION BY COUNSEL FOR
10 THE GOVERNMENT

11 BY MR. GREEN:

12 Q Good afternoon (inaudible).

13 A Good afternoon, Mr. Green.

14 Q I'm sorry you're involved in a death
15 penalty situation. I wish you much luck.

16 A Well, Mr. Green, considering your
17 advocacy at the last hearing, the death
18 penalty part has been somewhat a pleasure to
19 go through, in fact.

20 (Laughter.)

21 Q You -- you indicated that you

1 commissioned Ms. Hicks to give advice; is
2 that right?

3 A That's correct.

4 Q And she used her policy to try to
5 help you help your client stay within the
6 bounds of the law, as you understood it; is
7 that right?

8 A Mrs. Hicks, since she wrote the
9 policy, we thought that she would be the best
10 person to interpret the meaning of the
11 policy.

12 So, since she was available as a
13 consultant, we retained her, and asked her --
14 we explained the situation, and we asked her,
15 under her policy, if she would visit Mr.
16 Montiel's store and put his store in
17 compliance with the directives of her policy,
18 and that's what she did.

19 Q At what point did he, as you saw it,
20 come into compliance with the directives of
21 her policy?

1 A After she told us what to do, we
2 directed Mr. Montiel to get that done. He
3 hired individuals to implement that.

4 They physically took these coin-
5 operated booths out. They rebuilt some
6 walls. They electronically changed the
7 entire operations of the coin-operated
8 booths, so -- and that took maybe a couple of
9 months, and at a great expenditure to him.

10 So, at some point, he completed it.
11 We brought Ms. Hicks back once all of his
12 inventory was placed on the shelves, and she
13 basically said that his arrangement of his
14 inventory was in compliance with her policy.

15 Q Do you know when this took place,
16 this last visit of hers, this walk-through,
17 if you will?

18 A I can't really give you a -- a date.
19 But it was --

20 Q Did he (inaudible).

21 A It was before he opened up. I would

1 think it was probably in the fall, not in the
2 summer, to my best recollection, but --

3 Q September of 2001?

4 A I'm -- I'm not sure.

5 We had difficulty -- the police had
6 illegally seized his inventory, and it took
7 us a long time to get the inventory back from
8 Shannon Place; but once we got his inventory
9 back from Shannon Place, whenever that may
10 have been. There's a record of that.

11 And subsequent to that is when Ms.
12 Hicks took on the task of making sure that he
13 would be in compliance with her policy.

14 But I can't really venture whether it
15 was fall or summer at -- at the moment.

16 Q This policy that you talk about and
17 this advice from Ms. Hicks, did it take into
18 account semen on the floor?

19 A I don't -- I'm not certain I
20 understand your question.

21 Q Any semen on the floor, did it take

1 that into account?

2 A Mrs. Hicks' policy was arranging the
3 inventory in the store to fall within
4 whatever mathematical amounts of sexually-
5 oriented material versus non-sexually-
6 oriented materials, arrangements of the
7 number of booths that would fall within that
8 mathematical formula.

9 But in terms of semen on the floor,
10 her policy had nothing to do with semen on
11 the floor. And that --

12 Q How about dildo and sex toys
13 generally?

14 A And that as we -- if I may finish --

15 Q Well, I just want you to answer my
16 question.

17 A Well, I --

18 Q If it didn't take that into account,
19 then --

20 A If -- if you would give me the
21 courtesy to complete my answer, her ruling

1 and her policy had nothing to do with semen
2 on the floor. And at the hearing that we
3 participated in, I don't think it was ever
4 concluded to any scientific or medical
5 certainty that the substance on the floor was
6 semen. So there was reported substance on
7 the floor, but it was never tested by anyone
8 to determine that it was semen.

9 So your question as to semen
10 presupposes something that was never really
11 tested as a factual concept that there was
12 semen on the floor, because it was never
13 tested, if you recall.

14 Now, assuming that there was semen,
15 her policy and her directives had nothing to
16 do with any substances that may have been on
17 the floor.

18 Q I think we've had enough on this
19 semen question.

20 Why not -- why don't you tell us
21 about dildo and sex toy count?

1 A She -- whatever ruling in terms of
2 her policy --

3 Q Did it take that into account?

4 MR. KATZ: Objection.

5 THE WITNESS: -- whether he could
6 have --

7 THE COURT: I'll call that
8 (inaudible) -- O'Bryant, Mr. Katz?

9 MR. KATZ: Well, Mr. Green is
10 interrupting the answer to the last question
11 he asked, and it wasn't fully answered yet.
12 It wasn't being over-answered.

13 MR. GREEN: It really wasn't being
14 answered, Your Honor, but that's another
15 story.

16 THE WITNESS: Your Honor, for
17 completeness sake, I'll try to re-answer it.

18 THE COURT: Okay.

19 THE WITNESS: Maybe you could
20 rephrase the question, Mr. Green, to assist
21 me.

1 BY MR. GREEN:

2 Q What about the dildo and sex toy
3 count; was that taken into consideration with
4 regard to her policy?

5 A Was the sex toy and dildo count --

6 Q Dildo count. In other words, you're
7 saying that she gave policy advice about what
8 percentages, and so forth, were permitted.

9 A Uh-huh (affirmative).

10 Q And I'm asking you, did the dildo
11 count and the sex toy count fall within the
12 scope of this policy?

13 A Whatever sexually-oriented material
14 that she deemed permissible fell within the
15 count. Whether it was magazines, whether or
16 not he could sell condoms or dildos, whatever
17 was permissible, she told us, and she
18 factored that into whatever percentage that
19 she used that would make up sexually-oriented
20 materials.

21 Q Sir, how about the police viewing the

1 masturbation activity in the premises?

2 A That --

3 Q Was that taken into account and
4 consideration, too, the police viewing
5 masturbation activity on the premises?

6 A As I indicated, Mrs. Hicks' policy
7 took into consideration any inventory that
8 was permissible by law within her formula.
9 If it was 15 percent and 85 percent sexually-
10 oriented as opposed to non-sexually-oriented,
11 that's what her policy took into effect.

12 Whatever activity that was permitted
13 or may have transpired on the premises had
14 nothing to do with her policy, because her
15 policy dealt with tangible objects, not
16 activity or suspected substances that may
17 have been on the floor.

18 Q So, in other words, masturbation
19 activity viewed by the police on the premises
20 was not taken into account; is that right?

21 A That was not part of her objective

1 and her mission of directing Mr. Montiel to
2 have inventory present on the premises of his
3 store.

4 Q So, was the evident -- a written
5 agreement worked up between the agency and
6 your client at that time?

7 A Not that I'm aware of.

8 Q (No audio.) Did you ever take a
9 Board of Zoning Adjustment appeal?

10 A No, not on behalf of Mr. Montiel in
11 that case.

12 MR. GREEN: One moment, Your Honor.

13 BY MR. GREEN:

14 Q Are you being compensated for today's
15 appearance, sir?

16 A No, I'm not. And since you've raised
17 the issue of compensation, I -- I haven't --

18 MR. GREEN: Your Honor, I ask that
19 the witness be instructed to just answer my
20 question.

21 BY MR. GREEN:

1 Q And my question was, are you being
2 compensated for today's appearance; just a
3 simple yes or no?

4 A The answer to that is, no, Your
5 Honor. I'm doing this out of the --

6 MR. GREEN: Your Honor --

7 THE WITNESS: -- (inaudible) of my --

8 MR. GREEN: Your Honor, that's not --

9 THE COURT: The answer is, no, Mr.
10 Green.

11 MR. GREEN: Thank you.

12 THE COURT: Any other questions, Mr.
13 Green?

14 MR. GREEN: I don't have any other
15 questions, Your Honor.

16 REDIRECT EXAMINATION BY COUNSEL FOR

17 THE RESPONDENT

18 BY MR. KATZ:

19 Q I just have a few, Mr. O'Bryant.

20 A Yes.

21 Q Now, was J.M.M. Corporation open, or

1 reopened, before Ms. Hicks was retained by
2 your firm?

3 A No.

4 MR. KATZ: That's all I have.

5 THE COURT: Mr. O'Bryant --

6 THE WITNESS: Yes, sir.

7 THE COURT: -- you said there was no
8 written agreement between you, your client
9 and the agency with respect to this
10 operation?

11 THE WITNESS: That's correct, Your
12 Honor.

13 THE COURT: Was there an oral
14 agreement?

15 THE WITNESS: I can't say that there
16 was an oral agreement. There were discussions.

17 THE COURT: Did you relate to anyone,
18 including Mr. Katz, that there was some kind
19 of an agreement?

20 THE WITNESS: I related to Mr. Katz
21 that we had discussions and the substance of

1 those discussions.

2 Now, there was never an oral
3 agreement, there was never a written
4 agreement, but we were trying to come to some
5 type of an accommodation, and we operated
6 under a spirit of trying to reach an
7 accommodation so that Mr. Montiel, like any
8 other businessman, would be able to pursue
9 his business in compliance with the
10 regulations. That was the spirit of the
11 discussions, and that was the objective.

12 Now, as I've indicated, there were
13 very pointed, on both sides, legal opinions.
14 But in spite of that, we still tried to reach
15 an accommodation that Mr. Montiel could
16 operate his business.

17 And I think the best that I could put
18 it to you is that we were operating under,
19 and we believed our position, that the Hicks
20 policy was in effect, and that's what -- Mr.
21 Montiel was under that jurisdiction.

1 The Zoning Commissioner had, based on
2 Mr. Green's advice to him -- had taken the
3 position that there was a zero tolerance, and
4 he did not have to honor the Hicks opinion.
5 But in -- since all other businesses in the
6 city, basically, were operating under the
7 Hicks opinion, because no new opinion had
8 been promulgated by the Zoning Commissioner
9 at that time, Mr. Montiel was never put on
10 notice that there was a zero policy. There
11 was an accommodation on both sides to try to
12 reach some type of an agreement or some type
13 of operating mechanism whereby Mr. Montiel
14 could operate his business, and that's
15 basically what we did.

16 THE COURT: All right. When did you
17 turn over your file, or copies of your files,
18 to Mr. Katz?

19 THE WITNESS: I would say I really
20 can't answer that with specificity, but I
21 would think probably in the fall, maybe

1 September or something, of 2001, maybe
 2 August, September, thereabout, but -- but I
 3 really (no audio) couldn't tell you at the
 4 moment. I don't have the file with me.

5 THE COURT: Do you have an exact date
 6 when Ms. Hicks was retained to assist you in
 7 this matter?

8 THE WITNESS: It may be in the file,
 9 but I don't have a present recollection.
 10 There may be something that could assist me
 11 in refreshing my recollection.

12 There may be copies of checks that
 13 were paid to Ms. Hicks. Maybe that could
 14 refresh my recollection of approximately when
 15 she was retained.

16 MR. KATZ: I do have the information
 17 and document if you want me to --

18 THE COURT: What --

19 MR. KATZ: -- send that to you.

20 (Inaudible conversation.)

21 MR. KATZ: There's a letter here from

1 Mr. O'Bryant, dated February 8th of 2001, to
2 Ms. Hicks, if I may show it to him, because
3 I'm sure he can better explain it than I can.

4 THE COURT: Well, no; I just wanted
5 the date. So, is it February of 2 --

6 MR. KATZ: 2000 --February 8th of
7 2001.

8 THE COURT: Okay. That's when she
9 was retained?

10 MR. KATZ: Well, I don't know if
11 that's when she was retained. It's just a
12 letter saying that, here's our check in the
13 amount of -- here's our check --

14 THE COURT: The letter had a check
15 with it?

16 MR. KATZ: -- for full and final
17 payment.

18 THE COURT: Full and final payment?

19 MR. KATZ: Right.

20 THE COURT: On February 8th of 2001?

21 MR. KATZ: That's the date on the

1 letter, right.

2 THE COURT: Okay, all right.

3 Mr. O'Bryant, did you file an appeal
4 in -- in the previous matter --

5 THE WITNESS: I --

6 THE COURT: -- to the -- to the law,
7 Board of Appeals and Review?

8 THE WITNESS: I think we noted an
9 appeal, but we withdrew it -- but we didn't
10 go forward with an appeal. I do recall that
11 we initially -- whatever the time frame may
12 have been -- we noted an appeal. And -- but
13 at some point, I think we withdrew going
14 forward on the appeal.

15 THE COURT: You -- you had testified
16 that there was some agreement -- sorry --
17 some disagreement or disputes, I think, to
18 use the very exact words -- between whom?
19 Who were these individuals that were having a
20 dispute as to whether or not the Hicks
21 opinion was applicable?

1 THE WITNESS: Well, there was, I
2 think, a legal dispute between Mr. Matthew
3 Green and myself as to whether or not the
4 Hicks opinion should have been applicable to
5 Mr. Montiel at the time that he received this
6 notice of infraction.

7 Subsequent conversations with the
8 Zoning Commissioner, who was relying upon
9 learned counsel's advice, he took the
10 position that Mrs. Hicks' decision was not
11 applicable or binding on him. And therefore,
12 his position was that he had a zero
13 tolerance.

14 So our position and the dispute
15 became pointed in that our position was that
16 the Hicks policy was binding on Mr. Montiel,
17 and unless and until a new policy had been
18 promulgated, and Mr. Montiel had been given
19 notice of a new policy, that he was under the
20 Hicks policy.

21 So we had two conflicting legal

1 opinions. But in spite of that, we tried to
2 reach some type of an accord whereby Mr.
3 Montiel could conduct his business.

4 THE COURT: Did you advise Mr.
5 Montiel to reopen his business?

6 THE WITNESS: We advised Mr. Montiel
7 to reopen after he was in compliance under
8 the Hicks policy.

9 THE COURT: And when might that have
10 been?

11 THE WITNESS: I can't really tell you
12 a month that he reopened. And the best that
13 I can tell you now, I know it was after we
14 retrieved his inventory from Shannon Place,
15 which was probably at least four or five
16 months after the hearing that we had here.
17 I'm not sure when that was. (No audio.)

18 ...and we retained Ms. Hicks, and
19 after he fulfilled all of her directives, and
20 we had a walk-through, that's when we spoke
21 with the Zoning Commissioner for the last

1 time, and that's when we advised him to open
2 his business.

3 Now, our position was that he was in
4 compliance under Hicks, and if he received a
5 notice of infraction, then we would be
6 prepared to have a hearing, appeal it and, if
7 necessary, go to the Court of Appeals.

8 But we felt that under the first
9 notice of infraction, as your findings may
10 have been, that we wouldn't have had much
11 success in any type of appellate review. So
12 we were preparing for a possible Court of
13 Appeals case and, if necessary, Supreme Court
14 case.

15 MR. KATZ: Your Honor, only because
16 it's an informal proceeding, but I want to
17 talk out of turn. I do have some information
18 that might be of assistance to the Court in
19 the questions you're asking, including a -- a
20 -- we got a full transcript of Mr. Johnson's
21 testimony from last time. I have it right

123

1 here.

2 It shows that the Hicks was being
3 followed under his administration as to the
4 businesses that were in -- in operation at
5 the time that her opinion came out, and I'm
6 willing to hand this to Your Honor. I have
7 it right here.

8 THE COURT: Okay. If you could just
9 hold -- hold onto that for now.

10 MR. KATZ: The other piece of
11 information is, since you're asking appeals
12 and stuff -- Mr. Green know this -- we are --
13 we do now have a parallel proceeding in the
14 U.S. District Court before Judge James
15 Roberts, where we have filed a complaint for
16 an injunctive review to be placed on the
17 government's action, but enforcement
18 (inaudible).

19 THE COURT: Yeah; but I was only
20 referring to an appeal with respect to the
21 first...

1 (End of tape 8, side B.)

2 (Start of tape 9, side A.)

3 THE COURT: ... notice of infraction,
4 but not -- (no audio) -- what you may have
5 done since this two, three days ago.

6 MR. KATZ: I understand. I want to
7 be responsive in knowing what the limits were
8 in what you were looking for.

9 MR. COURT: Right.

10 THE WITNESS: But to be responsive to
11 your question, we felt legally that we would
12 not succeed based on the record that was made
13 at the hearing. So although we noted an
14 appeal, and after reviewing it, we decided
15 not to go forward.

16 And based on our understanding of the
17 law, as opposed to learned counsel, Mr.
18 Green's, understanding of the law, we decided
19 we would be in compliance, and once a notice
20 of infraction was issued, then we thought
21 that we would have standing, and we felt that

1 we would be successful either at an appellate
2 level or at the D.C. Court of Appeals level.

3 THE COURT: Did you explain to Mr.
4 Montiel as to what exactly you were -- all
5 the steps that you were taking, bringing Ms.
6 Hicks on and her recommendation -- did you
7 explain all that to him?

8 THE WITNESS: I think we fully
9 explained it to him.

10 Of course, like any businessman, Mr.
11 Montiel, I think, was interested in an
12 instant fix of getting back in business; and
13 whether or not there was a constitutional
14 issue or a case in the Court of Appeals
15 wasn't really of his immediate concern.

16 But we tried to brief him and explain
17 to him the procedure, what we had planned to
18 do, how we had planned to do it, why it was
19 important that he followed Ms. Hicks'
20 directives. We gave him specific
21 instructions on what to do, how to monitor

1 invitees to his business, how his business
2 should be conducted, especially in the late
3 hours when there were complaints. We advised
4 him how -- that he should get a security
5 person. In fact, we had really advised him
6 to find a new location.

7 But he was fully advised and -- of
8 how we were going to proceed. So we were
9 totally caught off guard when we learned that
10 Mr. Montiel had received a notice of
11 infraction, and we weren't really advised.
12 The next thing we knew was that he had new
13 counsel.

14 So -- but -- (no audio).

15 He was fully advised on each step.

16 THE COURT: Do you think he
17 understood everything you said to him?

18 THE WITNESS: I felt that he
19 understood the situation and how we were
20 going to proceed.

21 Whether or not he actually

1 appreciated that is another question, but I
2 think he understood it.

3 THE COURT: Do you think he speaks
4 enough English to understand what you were
5 saying?

6 THE WITNESS: I think he speaks
7 English enough to understand, but he had a
8 relative there that spoke English and tried
9 to translate to make certain that he
10 understood. So I would say that he had an
11 understanding.

12 THE COURT: All right, no other
13 questions.

14 Anything on redirect, Mr. Katz or Mr.
15 Green? Oh, all right, go right ahead.

16 MR. KATZ: It almost seemed that what
17 I was going to offer wasn't relevant to the
18 witness, but why don't I just offer this now
19 and -- and see if he's needed to help out
20 here.

21 I do offer into evidence -- I've

1 given a copy to Mr. Green -- I have the full
2 testimony of Mr. Johnson. (Inaudible) about
3 it is on page 21.

4 THE COURT: What page are we talking
5 about?

6 MR. KATZ: Page 21, set around line
7 12, Mr. Johnson does confirm that his
8 administration was following the Hicks memo
9 as applied to this, as it existed at the time
10 that the Hicks memo had gone into effect.

11 THE COURT: Well, Mr. Green, on this
12 document?

13 MR. GREEN: I've read the document,
14 and one question I have is it's just not a
15 certified transcript.

16 MR. KATZ: I can offer it. I can --

17 MR. GREEN: And that's the question I
18 would have, Your Honor.

19 MR. KATZ: I can clear that up. I --
20 I have the tape here, Your Honor, which would
21 have get along with that. We sent this on to

1 -- who's the court reporter we use?

2 VOICE: We sent this along to the
3 court reporter's office of Bradford and
4 Associates in Northern Virginia, since all --
5 all we have is tapes. So let me see if I can
6 find the tape.

7 MR. GREEN: Your Honor, I'd also --

8 MR. KATZ: They may be at the office.

9 MR. GREEN: I'd also point out that,
10 you know, it says -- it starts out, May 23rd,
11 2000, then (inaudible) recorded statement of
12 Michael Johnson.

13 MR. KATZ: Here it is.

14 MR. GREEN: You know, if there had
15 been some informata (ph) affixed to this --

16 MR. KATZ: Wait, wait, wait, wait a
17 minute. Hold on to those tapes. I've got --

18 MR. GREEN: Yeah. If there had been
19 some informata (ph) affixed to this
20 certifying this as a -- as a family (ph) copy
21 from the Office of Adjudication, I -- or from

1 some agent of the Office of Adjudication, so
2 authorized, I think that we could be in a
3 better position in terms of acceptance.

4 So I think the problems is that it's
5 not -- it doesn't fall within the -- that
6 particular parameter. And based on it, I
7 would pose my objection.

8 MR. KATZ: Well, I can (inaudible)
9 offer (inaudible) the audio tapes offer with
10 it. I must mention this is an (inaudible)
11 figure out which one it was.

12 THE COURT: Where -- where -- where
13 did the tapes come from Mr. --

14 MR. KATZ: We got the tapes from Mr.
15 O'Bryant, so it helps out that he's here. He
16 gave me the tapes, and I understand that Mr.
17 O'Bryant got them from -- from here, just
18 down the hall --

19 MR. GREEN: Yeah --

20 MR. KATZ: You have it in the office.

21 So, I mean, I -- I can authenticate

1 it through Mr. O'Bryant just by asking him a
2 couple of questions.

3 THE COURT: I don't see how he could
4 authenticate it. I mean, we get --

5 MR. KATZ: We got the chain of
6 custody through him -- through him right to
7 you today.

8 THE COURT: The chain of custody?
9 What --

10 MR. KATZ: I don't --

11 THE COURT: (Inaudible) a couple of
12 places.

13 MR. KATZ: I don't know if -- I mean
14 --

15 THE COURT: I mean, I -- I --

16 MR. KATZ: Well, I think this is
17 important to get into evidence that that's
18 what he said.

19 So we could do it one of two ways,
20 Your Honor. I can give you the tapes, plus
21 the transcript will be made. I could ask

1 some questions of Mr. O'Bryant. Or we could
2 do it the more difficult way time-wise. I
3 assume that -- I hope that --

4 THE COURT: Why is it the -- the
5 company didn't certify this?

6 MR. KATZ: Well, they -- they hadn't
7 -- they -- how could they certify it? All
8 they had was an audio tape. I mean, you
9 know, they --

10 THE COURT: So how would that
11 authenticate this?

12 MR. KATZ: Okay. That's the best
13 (inaudible) of how to authenticate the
14 document in front of you unless (inaudible)
15 listen to the tape.

16 If I ask Mr. O'Bryant one or two
17 questions, it might resolve this format,
18 please.

19 THE COURT: Go ahead with your
20 questions.

21 MR. GREEN: Let the record reflect

1 that I object, and I have a continuing
2 objection.

3 THE COURT: Very well.

4 BY MR. KATZ:

5 Q Mr. O'Bryant, I'm handing you these
6 four Maxell tapes. Would you look those over
7 and let me know if you recall whether they
8 were ever in your possession, and were they
9 were ever (inaudible), and how you originally
10 got hold of them?

11 A Okay.

12 Q Do you have an answer?

13 A These are audio tapes that were taken
14 at the time of the hearing in which we
15 represented Mr. Montiel before the Honorable
16 Judge Simon.

17 Q Okay, sir.

18 A And we secured these tapes in
19 preparation for appellate reasons --

20 Q And you --

21 A -- from this -- from this office.

1 Q And what procedures did you
2 (inaudible) to get hold of those tapes?

3 A Actually, I really couldn't tell you.
4 My office manager would have handled that.

5 Q The one -- is that the one who is
6 here with you now, or was this someone else?

7 A No. It was someone else who had
8 handled that.

9 Q You do recall giving those tapes to
10 me that we have here?

11 A Yes. Those were the tapes that we
12 received in reference to the hearing, and
13 those were given to you along with the file.

14 MR. KATZ: Thank you. As an officer
15 -- as an officer of the Court, Your Honor, I
16 verify these are the same tapes that Mr.
17 Green gave me --

18 MR. GREEN: Your Honor --

19 MR. KATZ: (Inaudible) Mr. O'Bryant.
20 I apologize. There's no intents of -- if you
21 knew how little sleep I've got in the last

1 two days -- my assistant knows that direct
2 (inaudible).

3 And I -- I would think it would be a
4 compliment, you know, I like -- I like, you
5 know, that I would say, Mr. Green, it must
6 mean that I have some positive...

7 (Laughter.)

8 MR. KATZ: I mean, could we
9 (inaudible) all right? I mean --

10 MR. GREEN: Sure.

11 MR. KATZ: Thank you. All right.

12 So, you know, I don't -- especially
13 with the reliance on the Rules of Evidence, I
14 don't think there should be an issue.

15 I -- I think the reason why Mr. --
16 why Mr. Green might not want these in is it's
17 something very favorable to us in that
18 transcript. And, I guess, if I were in his
19 chair, I might be trying to keep them out,
20 too. But I remember (inaudible) you know,
21 these are the rules of the procedures,

1 there's no way to keep it out, because it
2 brings us to the argument that we have which
3 is (inaudible) and intent. My client didn't
4 really have the bad thing that Your Honor
5 might have thought before Mr. O'Bryant came
6 in here today, and that really goes to the
7 crux of -- of --

8 THE COURT: I don't form an opinion
9 on anything until after the end of the
10 hearing.

11 MR. KATZ: Thank you.

12 THE COURT: I -- I --

13 MR. KATZ: And -- and if I -- if I
14 ever become a judge, let me make sure I do
15 that as well.

16 But basically, that's what it comes
17 down to, the crux of it --

18 MR. GREEN: (Inaudible.)

19 MR. KATZ: -- Your Honor. You know -
20 - you know, it's very interesting that
21 happened. My client acts on my (inaudible),

1 and the last thing I ever want to do is take
2 a case away from anyone else. But the bottom
3 line, it's like once I hear about there were
4 all these efforts, put Mr. O'Bryant through a
5 lot of work into it, and other people from
6 his office, and (inaudible) in his office,
7 Mr. Wright. And I was kind of stunned, too,
8 about, you know, why we had to come here.

9 But here we are, and my client faces
10 a lot of risk, whether or not we think that
11 he's got a lot of risk for today, he
12 certainly has a lot of risk by the fact that
13 the Government has tried -- has now notified
14 him of their intent to revoke his license.

15 And actually, I think, from a --

16 THE COURT: Remember we're keeping
17 that out of today's hearing (overlapping and
18 inaudible conversation).

19 MR. KATZ: I -- I certainly think that
20 -- that -- that there's -- there's no
21 sufficient question that these are the tapes.

1 And as an officer of the Court -- and my
2 assistant is here, too; she assisted in
3 ordering that transcript of that -- the
4 transcript. And if you don't want to read
5 the transcripts, for convenience you can
6 listen to the tape. If you don't want to
7 listen to these tapes, I'll -- I'll -- I'll
8 assist us as an officer of the Court in
9 getting the originals.

10 I hope that the Office of
11 Adjudication doesn't dispose of them. I
12 mean, these are very important items to have
13 here. These are what helped make our case
14 to, hopefully, really reduce any sanctions to
15 my client whatsoever if there is a sanction.

16 MR. GREEN: Your Honor?

17 THE COURT: Mr. Green.

18 MR. GREEN: Yeah. When we get to the
19 question of authentication -- and I had an
20 opportunity to look at these tapes, and I
21 looked at them and, you know, I saw writings

1 all over it. I don't see any kind of seal or
2 stamp or writing indicating Office of
3 Adjudication. I just see writings, and I
4 just see tapes. I -- I haven't seen any
5 documents indicating anything, you know. And
6 that's the problem I'm having here with this.

7 Particularly when I looked at the
8 written document, and it said -- then you
9 would know. At least if it had said, Office
10 of Adjudication or venue unknown, it means
11 that you're unknown, just not sexually-
12 oriented means not sexually-oriented, Your
13 Honor.

14 MR. KATZ: I'll tell you what, Your
15 Honor, I'll be happy to foot the bill of
16 having the Office of Adjudication type it
17 out. I forget if I checked out -- if I've
18 have gotten a transcript at all from the
19 Office of Adjudication -- no (ph) -- let
20 alone right away.

21 So what is an honest court (no audio)

1 reporter going to do when they say what's on
2 there? The best they can do they can have
3 what's (inaudible) they have in front of
4 them. The material I had for me came from
5 Mr. O'Bryant. I took the material I had, and
6 I gave it to the court reporter. I -- I
7 don't know how he could have done any better
8 than that then.

9 Your Honor, this is such beneficial
10 information, that transcript, to us, I would
11 hate to see us not have it come in. If you
12 don't want the transcript in, I understand.
13 We'll give you a nice -- a nice good taped --
14 it only takes me 10 minutes at the office to
15 (inaudible) information in the file we have
16 here on exactly which tape it is, but I'm
17 sure -- I'm pretty sure it's tape number 2 or
18 3.

19 If it doesn't come in, I don't know -
20 - what this means is, I guess, that it would
21 be helpful -- if this doesn't come in, it

1 would be helpful for (inaudible) from our
2 reporter to say to (inaudible) look, if you
3 ever get a tape from an administrative
4 agency, you better get certification that's
5 upwards and downwards and (inaudible) and out
6 of the wazoo (ph), even though the general
7 (inaudible) of these administrative hearings
8 is they're -- is they're informal hearings
9 and you have relaxed Rules of Evidence.

10 MR. GREEN: But, Your Honor, and I
11 think the Court is aware, that even in an
12 administrative proceeding, one can take a
13 tape and -- and particularly in light of what
14 Richard Milhouse Nixon did, and do all kinds
15 of horrible and twisted things to it.

16 And I'm not implying that my learned
17 associate over here would do anything like
18 that. But you know how technology goes.

19 MR. KATZ: Well, that -- that's what
20 it really comes down to. If there was any
21 doctoring that went on, it would have been by

1 Mr. O'Bryant or me. And there's no more
2 chance that Mr. O'Bryant would have done
3 anything --

4 THE COURT: Or the court reporter to
5 the --

6 MR. KATZ: -- to my understanding, or
7 me --

8 THE COURT: -- (inaudible) made a mistake

9 MR. KATZ: You can get -- let me tell
10 you something, Your Honor. I want to see
11 that tape to actually change the voices by
12 accident. I thought it was either Rosemary
13 Wood silence, or else you get everything.

14 THE COURT: All right.

15 MR. KATZ: Could you give it the
16 weight that it deserves?

17 THE COURT: What I will do, I will --
18 I will accept the document. I'll give it the
19 appropriate weight. So the objection is
20 noted, Mr. Green.

21 MR. GREEN: Thank you, Your Honor.

1 MR. KATZ: Okay.

2 Now, the final thing I have -- I
3 prefer -- I have the best evidence. This is
4 the original of my client. I've already sent
5 them to Mr. Green. This is the original of
6 his -- of his booth license, and I've got a
7 Xerox-type (inaudible) the record.

8 And the purpose of this is --

9 THE COURT: Do you want to put that
10 in the record?

11 MR. KATZ: Well, my client's got to
12 have that on --

13 THE COURT: (Inaudible).

14 MR. KATZ: No, I don't want to -- I
15 think he keeps that on the premises -- keep
16 that -- and to keep -- to keep --

17 THE COURT: Is the (inaudible) open
18 today?

19 MR. KATZ: That's my understanding,
20 yes.

21 THE COURT: Okay.

1 THE KATZ: The key issue, by
2 definition, is -- is it doesn't have any
3 limitations on it about adult orientation.
4 And my recollection is --

5 THE COURT: Say that again?

6 MR. KATZ: The booth license, there's
7 a separate license for the booths.

8 THE COURT: What -- what do you have
9 in your hands, first of all?

10 MR. KATZ: This is a mechanical
11 amusement machine license --

12 THE COURT: Okay.

13 MR. KATZ: -- issued to J.M.M.
14 Corporation --

15 THE COURT: Uh-huh (affirmative).

16 MR. KATZ: -- date issued, June 1st,
17 2001, valid until May 31st, 2003, for 10
18 booths.

19 The purpose for which I'm offering
20 this into evidence is it helps confirm that -
21 - that, you know, he didn't -- at least as

1 far as the booth license went, there wasn't
2 anything in there that limited him about
3 whether it was adult or non-adult videos that
4 -- that should be in there, at least in the
5 (inaudible) of this. It helps show -- give a
6 flavor of -- that he was operating last June.
7 It helps show that he did have permission
8 from the DCRA, the same agency right here, to
9 have 10 booths.

10 We would hope -- it doesn't always
11 happen that the right hand knows what the
12 left hand is doing, but we would hope that,
13 you know, the DCRA, the same arm that has the
14 Zoning Office, you know, knew that there
15 (inaudible) actions, and it never left the
16 office that approves booths (inaudible).

17 MR. GREEN: Of course, Your Honor, I
18 would object. I would object based on
19 relevance.

20 THE COURT: All right.

21 MR. GREEN: I would object based on

1 the -- the fact that this proceeding is not
2 one in which the mechanical amusement license
3 is at issue.

4 MR. KATZ: Well, it came in to us
5 during all the tests. Every time there was
6 any testing about apparent semen, or
7 someone's masturbating or this hole -- there
8 was testimony before at Mr. O'Bryant's
9 hearing that there was -- were holes between
10 booths -- so that every time there was any
11 testimony from the government witnesses about
12 what is going on the booths, it made this all
13 the more important, particularly not only
14 about the -- the liability issue, but also
15 about the penalty issue because, unless I'm
16 mistaken, the Court does have -- have a level
17 of -- of -- of discretion about what penalty
18 there should be against Mr. -- Mr. Montiel's
19 company, if indeed the Court does find that
20 there's any liability.

21 And I certainly don't want to keep

1 Mr. O'Bryant longer than necessary -- (no
2 audio) -- that's for sure. But that's all
3 the questions I expect to have of him, unless
4 someone else does.

5 And I -- I certainly do appreciate
6 his coming down. I think that -- I mean,
7 from my perspective, defending death penalty
8 cases is one of the highest callings on the
9 defense (inaudible), and I look forward to
10 when I'm able to just bite the bullet and
11 say, no matter what happens to the rest of my
12 practice, I'm going to do it.

13 THE COURT: This license -- I'm
14 trying to stretch it as much as I can --

15 MR. KATZ: Right.

16 THE COURT: -- I don't see the
17 relevance.

18 MR. KATZ: Okay. It -- now it goes
19 to good (inaudible), it goes to good thing,
20 to use George Orwell's words.

21 My -- my -- my hope and -- my hope,

1 of course, Your Honor, is despite how
2 unlikable or -- or brusque I can often be,
3 and -- and it -- it really happens with
4 everyone in their first dealings with me --
5 you can ask my -- my assistant even -- but
6 basically, we are hoping, obviously, to win.

7 But if we don't win, we're hoping
8 that we're not going to lose the whole load.
9 So my view is, if we're -- if we're not going
10 to win the whole load, hopefully, we're not
11 going to get the full penalty that's allowed
12 by law.

13 Presenting this --

14 THE COURT: Yes. But this will not
15 be (inaudible). So -- so, in other words, if
16 I understand you, what you're saying is that
17 this would be some form of --

18 MR. KATZ: Mitigation?

19 THE COURT: -- mitigation.

20 MR. KATZ: Well, it goes to that. It
21 also -- it also go to if Your Honor's going

1 to making a determination, whatever way Your
2 Honor feels is just, about the extent to
3 which J.M.M. is a sexual-oriented business is
4 running afoul of its license -- sorry,
5 Certificate of Occupancy -- then certainly
6 something needs to be taken to the mix. If -
7 - if you're going to be looking at, you know,
8 how many (inaudible) he had, and how many
9 booths, etcetera, and what was in there, this
10 does fall into the mix, because one of the
11 parts of the mix was that, unless and until
12 we have this -- this license for booths into
13 evidence, the whole question becomes, you
14 know, was this just another -- was this just
15 another straw on the camel's back about
16 something else he was doing where he was --
17 had anything that could be seen as sexual,
18 and was it in derogation of his license, and
19 whether or not it was intentional by any of
20 the witnesses on the other side -- I mean, if
21 I walked into that hearing room three days

1 ago, cold, the first time, you know, about
2 this case, I would have been thinking, gee,
3 is this guy trying to add X-rated, X-rated,
4 X-rated (inaudible). So he was trying to
5 show that in the mix -- because I think that
6 the decision in this case about whether --
7 whether he is liable is going to be a matter
8 of looking at the totality of the
9 circumstances.

10 This license is an important part of
11 it.

12 THE COURT: Yeah, but the issue here
13 is -- is the Certificate of Occupancy,
14 whether or not he is operating beyond the
15 scope --

16 MR. KATZ: Yes, Your Honor.

17 THE COURT: -- of the Certificate of
18 Occupancy, not his license.

19 MR. KATZ: I -- I -- I understand
20 that, but this is one more thing again where
21 we should go to the weight where at -- and

1 whether it comes in. It's just like, you
2 know, a whole bunch of testimony came in, but
3 I think it has nothing to do with whether he
4 was in -- in violation of the infractions
5 cited from the result of the testimony about
6 semen and masturbation.

7 So, let's just bring it in, and I
8 just ask Your Honor to give the weight that
9 you think it's due.

10 I -- I appreciate -- you -- you have
11 certainly indulged me more than most judges
12 have about letting me get my word in. And
13 you're pretty much heard the worst of it,
14 because we're pretty much -- you know, you
15 don't have any more opposing witnesses.

16 So, you know, I'm coming to you as --
17 as -- as respectfully as I can. Just ask
18 (inaudible), but -- but let it in and -- this
19 is not a jury trial here, so there's no -- no
20 adjudicator to be prejudice. Let's just let
21 it in and let it be given the weight it

1 deserves.

2 THE COURT: I'll reserve ruling on
3 this --

4 MR. KATZ: I know, Your Honor.

5 THE COURT: -- but we'll proceed.

6 MR. KATZ: May I get the original back?

7 THE COURT: Yes. I'll hold it. I --
8 I'll reserve -- before the end of the
9 hearing, I will -- any other questions, Mr.
10 Green, for Mr. O'Bryant?

11 MR. GREEN: No, Your Honor.

12 THE COURT: And nothing else, Mr.
13 Katz?

14 MR. KATZ: No. I was hoping to get
15 him out of here earlier than this.

16 THE COURT: Mr. O'Bryant, thank you
17 very much for coming in.

18 THE WITNESS: Thank you, Your Honor,
19 for your indulgence.

20 THE COURT: And the lady in the back.

21 VOICE: Yes. Thank you.

1 THE COURT: Thank you for coming in,
2 Mr. O'Bryant.

3 VOICE: Thank you.

4 THE WITNESS: All right. We were
5 happy to see Mr. Green.

6 (Inaudible conversation.)

7 MR. GREEN: Ma'am, thanks for putting
8 up with us.

9 VOICE: (Inaudible.) Good evening.

10 THE COURT: All right. Closing
11 statements anyone?

12 MR. KATZ: I have one.

13 MR. GREEN: Briefly, Your Honor.

14 THE COURT: Give me a minute. (No
15 audio.)

16 Do you want a minute to get your
17 thoughts together, or are you ready to go?

18 MR. KATZ: I'm ready.

19 MR. GREEN: Oh, I stay prepared for
20 that sort of thing, Your Honor.

21 THE COURT: All right. Go ahead, Mr.

1 Green.

2 MR. GREEN: This case is about
3 exceeding the scope of one's notice of
4 infraction. That's what this case is all
5 about, and nothing else.

6 This case is about a sexually -- a
7 sexually-oriented enterprise operating with a
8 not-sexually-oriented Certificate of
9 Occupancy.

10 This case is about the community that
11 has to put up with an enterprise that doesn't
12 want to abide by the law.

13 This case is about an enterprise
14 that, at the minimum, if we accept the Zoning
15 Administrator's opinion as Gospel, has
16 exceeded the 15 percentage by stock and
17 trade, by practice, and by its allowing of
18 individuals to come into a neighborhood and
19 destroy it. That's what this case is about.

20 Now, they were given an opportunity
21 to correct. They chose not to shut down for

1 a period of time; and they came back, and
2 they came back stronger, doing the same
3 thing. That's why we asked for enhanced
4 status as a recidivist, and we would ask
5 that, unfortunately, they be given another
6 fine; this time, doubled. That's what this
7 case is all about, nothing else, violation of
8 the zoning -- the regulations.

9 We feel that we've shown this through
10 our witnesses. We feel that we've shown this
11 through the introduction of documents.

12 If the Respondent wants to make a
13 change, there's an avenue to do it; that is
14 the Board of Zoning Adjustments or the City
15 Council, not this Court. This Court's
16 responsibility is only in enforcement of the
17 law as it's written. That's it. That's all
18 it's about; nothing else.

19 Thank you.

20 THE COURT: Mr. Katz.

21 MR. KATZ: Your Honor, if you'll

1 indulge me.

2 For the next few moments, my name is
3 Jose Montiel, and I am the owner of J.M.M.,
4 Incorporated. And J.M.M. stands for Jose
5 Maria Montiel; that's my name.

6 I opened up in 1996, a store called
7 Fun Fair Video on 5th Street, Northwest,
8 doing business, minding my own business,
9 paying payroll, paying the bills.

10 I opened in 1996. I go into 1997
11 just working at my business; working in my
12 business; 1999, the same thing.

13 In the year 2000, I get handed this
14 notice of infraction. I don't know what it
15 all means, so I go to a lawyer, Adjie
16 O'Bryant.

17 Within two months after I'm handed a
18 ticket, we have a hearing from Your Honor,
19 almost two years ago. At the time we have
20 the hearing, I'm closed -- actually, the
21 police have confiscated so much of my

1 inventory, I can't even operate without that
2 inventory.

3 A decision comes down from Your Honor
4 that we are in violation of what's charged in
5 the ticket; and I have discussions with my
6 lawyer, Adjie O'Bryant, how do I open back up
7 -- (no audio) -- how do I open back up so
8 they won't be trying to close me down again?

9 Mr. O'Bryant hires Ms. Hicks, the
10 esteemed Gladys Hicks who was the Zoning
11 Administrator back in 1998. Ms. Hicks
12 suggests to him how to open up without any
13 enforcement action of the government. And
14 Ms. --

15 (End of tape 9, side A.)

16 (Start of tape 9, side B.)

17 MR. KATZ: ...Mr. Green tells me what
18 to do, and I do it.

19 MR. GREEN: Objection, Your Honor.

20 THE COURT: How did Mr. Green -- how
21 did Mr. Green get in there, Mr. -- but who

1 did Mr. Green --

2 MR. KATZ: Well, sir, I -- I must be
3 so bad. Mr. O'Bryant.

4 THE COURT: Okay.

5 MR. KATZ: Someone's -- someone's
6 guiding me to the Matthew Green fan club,
7 I'll tell you that much.

8 (Laughter.)

9 THE COURT: Okay. Proceed.

10 MR. KATZ: Mr. O'Bryant advises me
11 what to do, and I do it. It's substantially
12 expenses, (inaudible) more and more work-
13 people, and remove booths, remove shelves. I
14 move stock from the front to the back,
15 (inaudible) stock from the front to the back.
16 I do everything that I'm advised to do my
17 lawyer, and I figure, well, I mean, if he's
18 getting advice from this Hicks woman who's
19 the head of this -- of this office, where are
20 we going wrong then?

21 And I reopen the latest in June of

1 2001, just as you see, Your Honor, from the
2 certificate for the booths. And it's June,
3 and I'm just working again and paying payroll
4 and paying the bills.

5 And it's July, I'm doing the same
6 thing. I'm trying to start up my business
7 again.

8 (Inaudible), Your Honor, is when I
9 was closed down, and a lot of clients don't
10 even want to come back anymore after I was
11 closed for so long. They just find other
12 places to go to shop.

13 It's August, the same thing, I'm
14 working hard in my business.

15 In September, I'm issued not just
16 one, but two, notices of infraction within
17 three days of each other. That's (inaudible)
18 hearing, that's (inaudible) by John Katz.

19 And what we have is it works for
20 J.M.M., the Hicks memo is the baseline, and
21 it was. We got it out of the (inaudible)

1 today with Mr. Bello, and he's (inaudible) by
2 this Hicks memorandum.

3 We have Mr. Johnson's words, page 21
4 of the transcript in front of you. Mr.
5 Johnson, of course, was the predecessor of
6 Mr. Bello, saying that Mr. -- at the J.M.M.
7 hearing almost three years ago, anybody who
8 was in business, and Gladys Hicks wrote her -
9 - issued her opinion in 1998, they get the
10 benefit of it.

11 And we know, of course, that J.M.M.
12 was in business when the Hicks memo came
13 down, because he's been in business in that
14 same location since 1996.

15 Now, since any lawyer's a fool to
16 rely on just one argument, I didn't just come
17 in with my constitutional argument; I came in
18 with package of arguments.

19 Now, for argument sake, assume
20 (inaudible) that the Hicks memo is what
21 applies. What has included into (inaudible)

1 to the Court of the Government that the
2 extent to which anything has been violated in
3 the Hicks memo other than booths, and I'm
4 going to get to that.

5 William Paine, the investigator that
6 we hired, hits the store twice unannounced
7 and takes measurements. And what are his
8 measurements: 550 feet VHS's and DVD's in
9 the adult section, 4,213 videos and DVD's in
10 the non-adult section.

11 What does that break out into
12 percentage-wise: 550 feet adult divided by
13 4,213 general, plus 4,700 adult (ph), that's
14 8 percent unit per unit of adult DVD's and
15 videos versus non-adult DVD's and videos, or
16 (inaudible).

17 So, (inaudible) talking about 15
18 percent, Your Honor -- (no audio) -- it's
19 well under 15 percent. It's under 8 percent
20 unit per unit of adult videos and DVD's in
21 the store (inaudible).

1 When I talk about adult versus non-
2 adult, I'm not talking about terms of art,
3 I'm just talking about what is clearly
4 marked, adult; it says, no one under 21 can
5 go in there.

6 You have in the record this
7 (inaudible) map that Mr. Paine, the
8 investigator, did at the store (inaudible)
9 design. And he meticulously measured inch
10 per inch, room per room, section per section.

11 I believe the percentage he gave for
12 -- not counting the booth area -- just for
13 everything else, the rest of the retail area,
14 how much did he say the adult section carried
15 over the whole store? It was less than 15
16 percent. And you don't have to rely on his
17 map, Your Honor, you've got the measurements
18 in there. And it's strenuously calculated.
19 We just want to rely on our own calculations.

20 So, assuming the Hicks memo is the
21 worst my client -- is the best my client can

1 get, and we want better than that, I don't
2 think you can go lower than the Hicks memo,
3 because she wrote the memo. Mr. Johnson
4 accepted the memo, at least for
5 grandfathering purposes for having applied to
6 the people who were already in business at
7 the time the memo came out.

8 We have number of (inaudible) now of
9 Mr. Johnson's successor, Bello, Mr. Bello,
10 accepting the Hicks memo.

11 So at worst for my client, the Hicks
12 memo applies.

13 Now let's talk about the booths. The
14 Hicks memo says booths are adult productions,
15 because Ms. Hicks, when she was consulted
16 with -- by Mr. O'Bryant, he was -- his
17 credibility was not in (inaudible). Well,
18 she advised reducing the number of booths.
19 Mr. Montiel does that (inaudible).

20 She advises, lower the inventory. He
21 does. It's confirmed, whatever happened in

1 the past, there are no dildos there now.

2 There was a question on, I think,
3 about what happened prior to the first notice
4 of infraction they issued two years ago.
5 There are no holes between the booths. And I
6 guess the extent to which he has holes
7 between the booths, that might entice
8 (inaudible).

9 Do people want this in their back
10 yard? Some might; some might not. But not
11 in my back yard, meaning you have nothing to
12 do with what we're talking about here.

13 At worst, my client (inaudible)
14 question of was he in violation of the Hicks
15 memo. No.

16 How do we ask if he was in violation
17 of the Hicks memo? Don't ask with that
18 intention (ph). Isn't that the essential
19 part of any court proceeding? Of course.
20 What was his intent? Did he have any bad
21 intent?

1 As to the two dates, September 10th
2 and September 13th of 2001, he didn't have a
3 bad intent.

4 Now, did he get ticketed again? If
5 something happens that we don't want to
6 happen, if he did (inaudible) today, and then
7 he gets ticketed again in the future, then I
8 suppose that the argument that I'm making now
9 doesn't work.

10 When you look at the intervention of
11 hearing two years ago, order from His Honor a
12 few weeks later, advice not from his counsel,
13 but from Ms. Hicks' (inaudible) -- his
14 counsel's discussions, Mr. O'Bryant's
15 discussions, with government officials, an
16 understanding from him that there looks to be
17 a safe harbor, his advice back to Mr. Montiel
18 about that.

19 I don't need to reiterate
20 constitutional arguments. I made those
21 already. I know where I stand as far as any

1 constitutional argue -- arguments. But, of
2 course, I now think that -- that there is --
3 there needs to be some practical adjust --
4 (no audio) -- put forth in the administrative
5 hearing process to -- to get the right
6 result, and I think part of that really is
7 where was the bad intent and where it wasn't,
8 and I don't think it was fair.

9 Now, of course, you're going to have
10 members of the neighborhood come in and be
11 upset that he's there. I mean, do you think
12 I want to live with an oil tanker behind me?
13 I don't mind having his store next to me, but
14 there -- all of us have things we don't want
15 to be right behind our house. For some, they
16 don't want to have a Muzak radio station
17 behind their house, for others it's the oil
18 tanker, for others it's the sexual-oriented
19 business.

20 Let's not blind ourselves to what the
21 possibility is for him to open up anywhere

1 else with a sexual-oriented business
2 Certificate of Occupancy, because in the real
3 world and if we're going to -- if we're not
4 having formal rules of evidence coming in
5 here, then if we're going to have that kind
6 of practicality that would just simplify the
7 evidence, let's simply everything. Let's go
8 to the real world and, as far as simplicity
9 goes, and they make a real world, we do
10 (inaudible).

11 I mean, what options really are there
12 to get a certificate to operate?

13 And then we did hear Mr. O'Bryant
14 talk about selective enforcement. Are we
15 going to consider that or not? Well, I think
16 it is something to take into consideration,
17 because if the government's going to come
18 here today and (inaudible) say, you know, we
19 can (inaudible) adult or non-adult, then I
20 think we need to explore that, and ask, is
21 that what this is really about? Is that what

1 this is really about? Is this really about
2 the government playing by the rules and just
3 wanting to stick by the rules, or is this
4 government saying, well, the neighbor here
5 complain, so we'll go after that store; the
6 neighbors over there haven't complained, so
7 we won't go after them.

8 If you're going to go that route,
9 obviously you're giving more rights to more
10 articulate neighbors than the ones who aren't
11 as articulate, the ones who don't write as
12 well. I don't think we want that.

13 Now, the end of the today's Friday,
14 and I don't think Your Honor's had lunch, let
15 alone dinner, so here's where I'm going to
16 try to wrap it up.

17 Before I get this case, Your Honor, I
18 never looked at one single provision
19 regarding sexual-oriented businesses in D.C.
20 And so the question -- question I got is, I'm
21 going through the pages, and we found

1 (inaudible).

2 Quite frankly, Your Honor, it really
3 wasn't until less than seven business days
4 ago that I got a really full grasp of what's
5 allowed and not allowed, or where the
6 boundaries are written down in the law, and
7 each of them are (inaudible). Now
8 (inaudible). It's not just to the people in
9 this room. It's a history I got. It's not
10 something I'm proud of.

11 But when I'm getting at here is if I
12 had trouble with addition, I'm willing to go
13 to the map and, you know, spend solitary
14 hours at home (inaudible).

15 How well is someone like Mr. Montiel
16 going to understand it?

17 (Inaudible) Your Honor, were the SOB
18 regulations with sufficient flare (ph) to
19 make it understandable, and to make it as
20 good as they could be, whether you compare
21 them to other jurisdictions or not? I really

170

1 don't think so.

2 I have a basis of comparison. I live
3 in D.C., so I will not bad-mouth D.C. I've
4 been here for over 10 years, probably over
5 12.

6 When you do the legislative rule-
7 making right, with a lot more input, and you
8 do it from -- okay, fine, do you want to do
9 it -- do you want to do it from the
10 regulation (inaudible), fine. Let's have
11 full notice and comment and full hearings.

12 But I think the problem was here is
13 when these rules were promulgated, it was in
14 1977. And we know that, because we know when
15 they were promulgated -- the evidence stage
16 is finished, so I guess I'm not allowed to
17 give it to you -- but I can take out -- it's
18 right here. Here, it's a public record. Can
19 I give it to him?

20 THE COURT: What -- what is that?

21 MR. KATZ: This is the D.C. -- D.C.

1 regulations for 1977, which essentially has
2 the definition of SOB. And so what do we
3 know then? And we don't have to go to the --
4 we can go -- we can go to just the SOB
5 (inaudible) 11 DCMR, Section 199.1, and it
6 tells exactly where these definitions
7 originated from, which says 24 DCR 5144, 1977
8 or '78.

9 What do we know about that time
10 period? This is a time period when the
11 (inaudible) is good on the state level, city
12 level, and federal -- may I, Your Honor?

13 THE COURT: Mr. Green?

14 MR. KATZ: As an officer of the
15 Court, this is exactly what I got right out
16 of the D.C. office, a George Washington
17 University law doctrine.

18 MR. GREEN: This is not a good law,
19 is it? Is it still in existence?

20 MR. KATZ: It's the legislative
21 history. I know (inaudible) to it from the

1 main crux of what's in there.

2 Now, if you don't take it from me,
3 you can look it up, so I won't --

4 THE COURT: Go ahead.

5 MR. KATZ: This is what has happened
6 in 1977. This is a time when Jimmy Carter --
7 Jimmy Carter became President in 1977, and
8 that's when we came up with the Freedom of
9 Information Act, or acts (inaudible) and the
10 Sunshine laws, and then I was seeing -- and
11 comments rules (ph).

12 So is this really --

13 MR. GREEN: The only problem I have
14 with that, Your Honor, is (inaudible). I
15 mean, are we -- are we being governed by this
16 today?

17 MR. KATZ: I'm going to close it up.
18 I'm getting close to (inaudible).

19 THE COURT: All right. Go ahead. Go
20 ahead, Mr. Katz.

21 MR. KATZ: We were at a twilight

1 time. We were at this new time when those
2 were promulgated, and they're just not really
3 clean.

4 And we now have examples to where it
5 is clean. We have it in Montgomery County,
6 Prince -- and I'm not the happiest with
7 Montgomery County, but, you know, at least
8 they had the whole hearings and the whole
9 schmeel (ph) and they have their adult
10 (inaudible).

11 But what they have in their adult
12 zoning law is -- and this was pulled up right
13 from the -- Internet -- it just says, As we
14 relied on these 11 studies about secondary --
15 about secondary effects from, you know,
16 various jurisdictions around the country, we
17 have determined that adult entertainment
18 businesses have a negative secondary effect.
19 So here's what we're going to do since we
20 know that they can't be totally disciplined.
21 We will set up new zones -- new zones, I-1,

1 I-2, C-2 adult business. You can go there
2 without any restrictions except that they
3 must be at least 1,000 feet in protected
4 uses. Some of the protected uses are DCMR
5 (ph) schools, churches and parks, and that's
6 it, period.

7 What we have here, in reality, Your
8 Honor, in D.C. is we don't have a mechanism,
9 a proper mechanism, a fair mechanism -- I
10 would say a legal mechanism -- for a business
11 that wants to sell sexually-oriented items to
12 actually be unfettered, because I've already
13 referred to some (inaudible) cited
14 (inaudible) memorandum, the problems with the
15 definition and the guidelines for any DCMR
16 about what would happen due to (inaudible).

17 So what we really have, Your Honor,
18 is a situation where businesses that well
19 sexually-related or sexually-explicit
20 products have their backs to the wall about
21 if they're going to put down on their

1 application, this is a sexually-oriented
2 business, and they hand it over here on the
3 second floor in this building, it's going to
4 get rejected. And if they had it over to the
5 Board of Zoning Adjustments, it's going to
6 take them a long time to get them in there,
7 too, because I had someone go down there, and
8 they didn't have any papers -- paperwork to
9 do it, and then you have to have a hearing.

10 Now, I'm going to narrow down
11 something about the law that I think you'll
12 want to know, which is it has been made clear
13 in the Supreme Court that if you're going to
14 have a scheme -- not a negative scheme, but a
15 process to go through to open up as a sexual-
16 oriented business, number one, there has to
17 be some sort of time limits for the
18 government to decide, and there has to be a
19 fair appeal period. And that is in the FWPBS
20 (ph) that I cited to (inaudible) in my
21 memorandum.

1 Everything going on here today is
2 about J.M.M. Corporation; not about me, not
3 about my views of the Constitution, not about
4 my views of the person (inaudible). Because
5 if we ever come into Court, they would just
6 bring up our agenda, and we just violated one
7 of the most important ethical rules, which is
8 we are therefore applying to fulfill the
9 ethical obligations to the hilt within the
10 bounds of the laws of evidence.

11 There's nothing wrong with going
12 beyond the black and white on a piece of
13 page, about what's in the rules and what's in
14 (inaudible) -- (no audio) -- and asking
15 ourselves, how is this affecting the lives --
16 because after all, Your Honor, this is an
17 agency that is here to serve the citizens,
18 not only of D.C., but everybody who comes in
19 here.

20 J.M.M. is a corporate citizen of
21 D.C., and it's been so at least since 1996.

1 Jose Montiel is a resident of D.C.

2 I'm hoping you're going to take this
3 case under advisement. If I was presented
4 this case over merely two days rather than
5 hours and hours I have spent just helping out
6 J.M.M. on this case alone, I am (inaudible).

7 I ask you now to look at the
8 definition of sexual-oriented business and
9 enterprise. Let's ask ourselves, is it
10 really clear what it means? Is it really
11 clear to the lay person it means. And if it
12 was clear to the lay person, why did Ms.
13 Hicks have to come down with an opinion
14 that's not just one page, but it goes on and
15 on and on. Who's going to read this and
16 understand it? She wrote this opinion
17 because she didn't think that what was in the
18 D.C. law was clear. All her opinion did was
19 made it all the more confusing.

20 Who is going to read this and
21 understand it? Even a lawyer, I try and

1 understand it. Even she did not understand
2 her own opinion, because if she understood
3 her opinion -- own opinion, or always agree
4 with it, why did she change from saying,
5 (inaudible) sexually-oriented, when she wrote
6 this document, and then by late 2000, early
7 2001, she says, Adjie O'Bryant, the lawyer
8 for Jose Montiel, cannot (inaudible).

9 If we don't confront the messiness
10 and the way these rules are written, then
11 it's -- it's just going to play out again and
12 again and again, and then you have these
13 hearings.

14 I'm going to take 30 seconds more,
15 and less than that, to sum this up. We
16 really do put it into your hands. We really
17 do.

18 I'm sorry if I didn't anything to
19 offend you. I know I overstepped the line
20 quite a bit, and it's not right to let
21 passions do that, Your Honor. I'm sorry

1 about that.

2 I also note that you've built up some
3 more battle scars than I have over the years
4 -- or I assume that -- and your skin's
5 probably just as thick as mine at least. I
6 let you know that we're in your hands, and it
7 has nothing to do with my personality; it has
8 everything to do with what we've heard in
9 this courtroom today, everything we've heard
10 in the courtroom three days ago.

11 So we ask for a finding of not in
12 violation of the infractions. We welcome
13 advisory opinion, because if there's any
14 notice of infraction in the future, I'll
15 (inaudible) you know, the more advice, the
16 better.

17 If you do find infraction, all that
18 my opponent -- all that Mr. Green has asked
19 for is a fine. He did not ask for -- for
20 closure. I did -- I did not find anything in
21 the law that provides for that. Please don't

1 give him anything worse than Mr. Green's ask
2 for; please don't give him closure.

3 And if you order closure, please give
4 a clear road-map about what we want, because
5 in your opinion from the year 2000, it just
6 said, he didn't comply. It didn't -- it
7 didn't say any more than that.

8 So, please, at least give us guidance
9 in the hopes that this isn't just a matter of
10 what is the decision, what is the sanction if
11 it's a negative decision; but what if the
12 decision -- and if there's any negative
13 decision, for example, what is the road-map
14 for him to comply.

15 Thank you.

16 THE COURT: All right. Anything
17 else, Mr. Green?

18 MR. GREEN: No, Your Honor.

19 THE COURT: Sir?

20 MR. GREEN: No, Your Honor.

21 THE COURT: Okay, fine. Sir?

1 MR. VOICE: I wanted to respond to
2 this accusation that we're an (inaudible)
3 neighborhood, because we are not, Your Honor.

4 At last count, we had over 20
5 community-service organizations from group
6 homes for the mentally retarded, for senior
7 citizens, for AA programs, for rehabilitation
8 programs, feeding programs, for the homeless,
9 including medical services, within our
10 neighborhood boundaries. We embrace them.
11 Many of our neighbors volunteer for these
12 groups.

13 We have the Northwest element out
14 (inaudible), after-school care for kids,
15 measuring programs. A lot of our neighbors
16 volunteer there. We are -- we embrace the
17 diversity of our neighborhood.

18 What we are opposed to are businesses
19 that operate outside the law -- (no audio) --
20 and we do not come into this as the sex
21 police. We address this -- this issue as a

1 matter of public safety, and one of the first
2 illicit business -- businesses in our
3 neighborhood, because it drives people out of
4 our neighborhood, because they are afraid to
5 come in because of the muggings, by the
6 prostitutes that frequent inside the premises
7 and outside the premises.

8 When we did our Neighborhood Watch
9 last Friday night -- I don't think individual
10 prostitutes survive.

11 MR. KATZ: (Inaudible) note my
12 continuing objection about this witness
13 continues to take --

14 MR. VOICE: (Inaudible), Your Honor.
15 I just really --

16 (Overlapping and inaudible
17 conversation.)

18 THE COURT: All right.

19 Gentlemen, I'm going -- I'm not going
20 to make a decision right now, Mr. Katz.

21 What I'm going to do is to request a

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1 proposed findings of facts, conclusions of
2 law.

3 Let me speak to Mr. Katz first. It
4 should not be more than four pages, Mr. Katz
5 --

6 MR. KATZ: Okay. Four pages, thank
7 you.

8 THE COURT: -- five pages. Don't --
9 don't give me 20 pages.

10 MR. KATZ: I -- I understand.

11 THE COURT: Four pages, five pages.
12 Today is the 8th. How about the
13 18th?

14 MR. KATZ: That's fine.

15 THE COURT: Mr. Green?

16 MR. GREEN: I'll do my best, Your
17 Honor, to meet that deadline.

18 THE COURT: And then after I receive
19 that on the 18th, I will try my best, among
20 other things that I'm trying, to get a
21 decision out by the first week of April.

1 MR. KATZ: I'm in no rush for a
2 decision, Your Honor.

3 THE COURT: I know, but I would like
4 to get it out; plus, I have lots of other
5 things pending.

6 MR. KATZ: Right.

7 THE COURT: But -- so, findings on
8 March 18th.

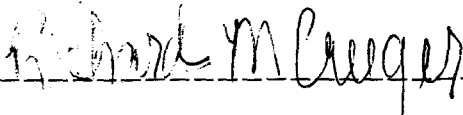
9 Let the record reflect it is not
10 4:21, and this hearing is now concluded.

11 (Whereupon, at 4:21 p.m., the hearing
12 was concluded.)

13

1
2 CERTIFICATE OF TRANSCRIPTIONIST

3 I, Richard M. Creeger, transcriber,
4 do hereby certify that the preceding excerpt
5 of trial proceedings is a verbatim transcript
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12 RICHARD M. CREEGER

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